Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

YARDARM RESTAURANT, INC.
Petitioner,

v.

CITY OF POMPANO BEACH, FLORIDA
Respondent.

◆

Petition For a Writ of Certiorari
To the District Court of Appeal
Fourth District of Florida

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Fifth Amendment require compensation to a private property owner when a 13 year period of illegitimate regulatory conduct causes foreclosure allowing a city to purchase the property at a greatly reduced price?

II. Does the *First English* allowance of temporary takings damages eliminate any cause of action under the Fifth Amendment for a permanent taking when regulatory activities, persisting over a 13 year period, cause foreclosure and loss of private property?

III. Can a state constitutionally time bar a cause of action for a permanent taking against it or its political subdivisions based on a ripeness doctrine applicable to a temporary taking?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, **Yardarm Restaurant, Inc.**, a Florida corporation and **The City of Pompano Beach, Florida**.

RULE 29.1 LISTING

Yardarm Restaurant, Inc. has no parent companies or subsidiaries.

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Petition For a Writ of Certiorari To the District Court of Appeal Fourth District of Florida

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, **Yardarm Restaurant, Inc.** respectfully requests that a Writ of Certiorari issue to review the September 9, 1994 judgment and opinion of the District Court of Appeal for the Fourth District of Florida, petition for certiorari denied by the Supreme Court of Florida, January 30, 1995.

OPINIONS BELOW

The memorandum order of the Supreme Court of Florida dated January 30, 1995 refusing to review this case is reprinted

in the Appendix at A-1.

The opinion and judgment of the District Court of Appeal Fourth District of Florida (Judges of the Fifth District sitting by designation) is reported at 641 So.2d 1377 (Fla. Dist. Ct. App. 1994), and is reprinted in the Appendix at A-2.

The opinion and judgment of the Circuit Court for the Seventeenth Judicial Circuit of Florida, Judge C. Lavon Ward presiding, entered June 6, 1991, was not reported and is reprinted in the Appendix at A-23.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the District Court of Appeal Fourth District of Florida of September 9, 1994, Petition for Certiorari denied by the Supreme Court of Florida on January 30, 1995. The Supreme Court has jurisdiction to review this case by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

STATEMENT OF THE CASE

This is a case about a company that was forced to fight City Hall in order to build a project it always had every legal right to build. It won again and again and again until it won itself into foreclosure, bankruptcy and the loss of its property. The factual chronology is largely undisputed.

In 1959, two brothers opened the Yardarm Restaurant. The restaurant was located on land overlooking the Hillsboro Inlet which leads directly to the Atlantic ocean, and provided a commanding view of the Hillsboro Inlet Lighthouse. The Yardarm sat in the middle of an existing commercial district in the City of Pompano Beach, Florida which provided for all types of high volume consumer oriented endeavors, including hotels, motels, liquor stores, bars, office buildings, theaters, auditoriums, parking lots, hospitals and much more. None of these businesses was restricted in height or density by any law of the City of Pompano.

Eventually, a 14 story condominium was built in this commercial district across the street from the restaurant. Since the condominium was considerably taller than the existing restaurant, many of its residents had a view of the Hillsboro Inlet, the lighthouse and the ocean.

The Yardarm Restaurant was noted as one of the 10 best and busiest restaurants in the State of Florida. The restaurant was so successful in this special location that the brothers conceived a plan to turn the Yardarm property into a European style grand hotel and marina. In 1972 Yardarm hired an experienced hotel architect to determine the feasibility of such

a project. Finding no height, density, zoning or any legal restrictions whatsoever, Yardarm's preliminary hotel plans were submitted to the city and approved.

The approval of this major project generated a great deal of publicity. Not all citizens of Pompano Beach were happy with the idea of the Yardarm project, particularly a few politically influential citizens who feared the project would block their view of the lighthouse and the beach. Thus began what the opinion below labels as the "sorry saga" of the Yardarm.

Bowing to political pressure, public officials vowed the project would never be built. The city refused to meet to finalize site plans until it passed an ordinance restricting building height to 10 stories. The ordinance immediately blocked the building of the hotel. Yardarm applied for a legally entitled exception and was met with more resistance in the form of building moratoriums, a change in density restrictions and an entirely different interpretation of the setback laws. The mayor of Pompano proclaimed that he would get the city commission to so restrict the setback requirements that the only thing Yardarm could build would be a "needle."

At this point the City was truly in a bind. There is no dispute on this record that there was no legal means to stop the Yardarm project and that its owners (at least through the late 1970's) had the independent financial means to build it. On the other hand, serious political pressure was being applied to stop the project. Initially, the City did the right thing.

On September 9, 1973, the mayor proposed to the City Commission passage of a referendum to purchase the Yardarm property (Tr. 1192-93, 1196). The proposal was defeated. Instead, the City took a course which both the trial court and

the opinion below found did not advance a legitimate state interest.

Yardarm eventually secured an ordinance allowing it to build the 18 story hotel and was immediately met with a lawsuit filed by a homeowner's group against the City seeking repeal of the ordinance. Because city officials declared that they hoped Pompano would lose the suit and that the City had no interest in defending this suit, Yardarm had to intervene. One and a half years later, Judge Jose Gonzalez found the ordinance to be valid.

On February 14, 1974, Yardarm received its first building permit. Four days later, the permit was revoked due to "administrative oversights." These "oversights" included such things as the plans having been submitted on the wrong color paper. They were easily remedied and Yardarm re-applied for a permit but was again refused. This time, the City claimed Yardarm needed to more than double the proposed number of parking spaces. When the City refused to budge on the parking, Yardarm was again forced to go to court.

In June of 1974, Yardarm filed a declaratory relief action. The City moved for summary judgment claiming Yardarm "failed to exhaust administrative remedies," which the trial court denied. However, the City appealed this *denial* of summary judgment. Two years after filing suit, the Court of Appeals ruled in Yardarm's favor. Thus, Yardarm was finally able to proceed to trial before a visiting judge. On September 27, 1976, the trial court ordered Yardarm to be given a permit upon presentation of plans in compliance with building and zoning laws existing on February 14, 1974, the date the initial permit was issued.

Now, three years and nine months after Yardarm first approached the City with its plans, it could finally reapply for a permit. Notwithstanding the court order, the City again refused to issue a permit, still claiming Yardarm needed to double its parking spaces. Litigation renewed, and on March 14, 1977 the court again found in favor of Yardarm. Yardarm's second permit was issued the following day. In April, 1977 construction of the hotel began in earnest with the demolition of the Yardarm Restaurant, driving of pilings and construction of a seawall.

Less than two months after the second permit was issued, more trouble arose. Unlike the initial permit, the second permit did not include approval for the dock and marina which were an integral part of the Yardarm project. After another year and another trial, the City agreed to an order allowing the docks to be built. This order required the City to provide any written assurances required by the Corps of Engineers. Instead, the City wrote the Corps of Engineers demanding that the dock permit be denied.

While the parties were fighting this issue, the City again revoked the building permit claiming insufficient work was being done. Despite the prior court order that Yardarm's permit was to be judged by standards in place on February 14, 1974, this third revocation was based on 1979 rules. The local zoning board ordered the City to reinstate the permit. The City refused and instituted a lawsuit. The trial court ruled in Yardarm's favor and the City appealed. While this litigation was ongoing the City Manager commanded that no work could be done on the property until all subsequent appeals were decided.

Once again, the appellate court ruled in Yardarm's favor. Thus, on July 16, 1981, after a further delay of two years, the

permit was reissued for a third time. Due to unprecedented inflation and increases in building costs specifically during the 1978-1981 period, the cost of the project nearly quadrupled. Yardarm was forced to reorganize the project and seek outside institutional financing.

Along with the need for institutional lenders came rules, requirements and guidelines, such as size of the project, size of the land, per room costs, affiliation with national hotel chains, management agreements, and myriad other issues which Yardarm did not have to address when it was still capable of financing the project itself. For example, Yardarm brought in Mr. Stanley Graves as "project manager." Mr. Graves was project manager for Disney World and described as the best in the United States.

When Mr. Graves began with the Yardarm he described the project as a "slam dunk." Comparing the Yardarm with his many other projects, including the initial Disney hotels, Graves found everything was positive except for the lack of support from the City. Other witnesses described the Yardarm property as the most magnificent site for a hotel in North America.

Yardarm began an international effort to find financing. To make the project a more normal lending situation Yardarm acquired another piece of land directly across the street from its original property. It paid for this acquisition and funded fees for construction, architecture and consultants by mortgaging the original parcel which it owned outright. Despite its international efforts, Yardarm found it impossible to obtain appropriate financing. The trial court specifically found that Yardarm's inability to find financing was a direct result of the City's activities.

During this period, Yardarm's plan was to do as much work as possible to keep its permit alive while seeking permanent financing. The City visited the project virtually every day and continued making demands for changes. Despite Yardarm's attempt to keep the project alive by using the proceeds from its mortgages on the property, the City again deemed work progress insufficient and on May 1, 1985, revoked the building permit for the third and *final* time. The letter of revocation gave Yardarm until October 30, 1985 (180 days) to refile its plans. Yardarm refiled its plans on time, but the City ignored them. In addition, the City Commission voted to strip Yardarm of its 18 story zoning. Faced with this dilemma, Yardarm filed suit to enjoin the commissioners from meeting a second time to finalize the zoning repeal. The trial court granted this relief, but was later reversed on appeal.

At this juncture, Yardarm had invested nearly $6 million in building the hotel project. However, with its permit gone and its zoning at risk, Yardarm suffered a well publicized foreclosure of its property and bankruptcy. No one bid at the foreclosure sale where the property reverted to the Resolution Trust Corporation which in turn sold it to the City of Pompano for $3.75 million. Thus 14 years after its initial plans were approved, the City of Pompano finally succeeded in killing the Yardarm project. Today, the Yardarm site is a city park.

On September 15, 1987, Yardarm Restaurant, Inc. sued Pompano alleging, *inter alia*, inverse condemnation under the Fifth Amendment and a violation of 42 U.S.C. §1983. Claiming the §1983 action to be premature, the City moved for summary judgment which was granted by the trial court. The case proceeded to a bifurcated trial on the inverse condemnation claim (liability only) which lasted 11 days.

In a lengthy opinion, the trial court ruled in favor of Yardarm finding that a permanent taking occurred on October 30, 1985 when the last permit revocation became final. It also held that since Yardarm's interference did not advance a legitimate state interest, it was not necessary to demonstrate loss of all use of property, but even if such a loss was required, all use was denied. Further, the trial court determined that even assuming there was a statute of limitations for inverse condemnation claims in the State of Florida, the statute could not have run in this case.

The City appealed to the Fourth District Court of Appeals. Eighteen months after briefing and oral argument were completed, the Florida Supreme Court *sua sponte* reassigned the case to three particular judges sitting in the Fifth District. Supplemental briefs and further oral arguments were required.

On September 9, 1994, over three years after the trial court opinion, the Fifth District Judges, sitting by designation as Fourth District judges, reversed the trial court finding that due to an alleged change in the law during the pendency of the appeal, there could be no permanent taking even though the City's regulatory interference did not advance legitimate state interests. Rather, the court found Yardarm's exclusive remedy to be a §1983 claim and remanded the case for purposes of considering that claim.

The opinion below also found no taking because Yardarm was not denied all use of its property since it remained free to put other projects on the land, and because the land itself still retained value. Finally, the court time barred the inverse condemnation claim before it became ripe under federal or Florida law by finding that, if there was a taking, it occurred on July 16, 1981 when Yardarm's third permit was *issued*, and not

when that permit was revoked in 1985.

In reaching these conclusions, the opinion below rejects the trial court holding that all beneficial use of the property was denied; the record evidence that the City would not have allowed any other project to be built; and the record evidence that no other project would have been economically feasible. The opinion below also fails to explain why switching to another use after expending $6 million for a hotel is economically viable or how a property which it claimed to be worth $8 million just prior to foreclosure was able to be purchased for less than half of that amount by the City of Pompano.

Yardarm filed a Petition for Certiorari in the Supreme Court of Florida. That petition was denied on January 30, 1995.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DISSOLVE REIGNING NATIONAL CONFUSION ON THE INTERPLAY OF TEMPORARY V. PERMANENT TAKINGS.

This Petition invites the Court to map previously travelled but still uncharted areas of regulatory takings law. In recent years, this Court has taken several cases for the purposes of answering the constitutional questions posed by this case. The questions often went unanswered due to problems such as lack of ripeness. No such problem is present here. Further, this case

presents a unique opportunity for the court to delineate standards as the states attempt to comply with, or (arguably) avoid, the dictates of First English and its progeny.

A. Do Regulations Which Fail To Advance Legitimate State Interests But Do Not Deprive Substantially All Economic, Beneficial Or Productive Use Of Private Property Require Compensation Under The Fifth Amendment?

The initial question is whether the Fifth Amendment requires just compensation for regulations which fail to substantially advance legitimate state interests, even if they do not deny substantially all use of property. The Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987) and *Dolan v. Tigard*, __ U. S. __, 114 S. Ct. 2309 (1994), appear to answer the question affirmatively by virtue of their holdings. But, a major issue in this case was not squarely presented therein.

The same question presented here was squarely presented in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U. S. 172, 185 (1985), but left unanswered due to ripeness problems. The unanswered question was whether a regulation viewed as violative of the Fourteenth Amendment's Due Process Clause "because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain ... need not be remedied by 'just compensation.' " *Id.*, at 185. The court found that question "must be left for another day." *Id.* This question is squarely

presented today. The opinion below specifically answers this question in the affirmative.

Both *Nollan* and *Dolan* found, at least preliminarily, that the regulatory permits conditioned on easements failed to advance a legitimate state interest and could constitute a taking requiring just compensation even though economically beneficial use of the property remained intact. The majority opinion in *Nollan* recognized that, "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former substantially advance the later." *Id.*, at 834. The majority decision believed the standards to be different from those applied to due process or equal protection claims. The dissent (Justice Brennan) claims them to be the same. *Id.*, at 834, n.3.

Dolan went one step further establishing a two-prong evaluation in this area: (1) Whether the "essential nexus" exists between the "legitimate state interest" and the regulation; and (2) if so, whether the degree of the regulation is "roughly proportional" to the projected impact of the proposed development.

The second half of this bifurcated evaluation appears to dispel the notion that a police power regulation not enacted in furtherance of valid public purpose may not confer a "public use" and thus may not trigger just compensation under the Fifth Amendment as opposed to damages under 42 U.S.C. §1983 for a Fourteenth Amendment due process violation. *See e.g.* Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U. S. 621, 656, n.23 (1981).

Under its facts *Dolan* could not specifically reach this question, however, the decision below expressly holds that:

> The lower court incorrectly ruled that a judgment for inverse condemnation could be had, even in the absence of a deprivation of substantially all use of Yardarm's property, if Pompano Beach's interference with Yardarm's plan for development were an invalid exercise of its police power.
>
> ***
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> Here, the lower court determined that the City's actions were 'illegal,' 'arbitrary and capricious,' 'not taken to promote the public's health, safety or welfare,' 'frivolous,' 'dilatory' and a 'usurpation of authority.'

Pompano Beach v. Yardarm Restaurant, Inc., 641 So. 2d 1377, 1384-85 (Fla. Dist. Ct. App. 1994). Essentially, this opinion holds that because the City's conduct was so bad the Fifth Amendment may be ignored. *Compare Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980) ("the Taking Clause of the Fifth Amendment ... stands as a shield against the arbitrary use of governmental power.") Thus, the lower court exterminates any Fifth Amendment remedy for governmental regulations which fail to advance a legitimate state interest.

The opinion below admits that regulatory takings law is "one of the most confused areas in American Jurisprudence," *Id.*, at 1384, and blames this Court. The culprit for this confusion, says the lower court, is language used loosely in this Court's decisions in *Agins v. Tiburon*, 447 U. S. 255, 260 (1980); *Nectow v. Cambridge*, 277 U. S. 183 (1928); *Penn*

Central Transportation Co. v. New York, 438 U. S. 104, 123 (1978); and *Nollan*, 483 U. S. at 834, n.3. *Yardarm*, 641 So.2d, at 1384, n. 9.

From *Penn Central* to *Lucas v. South Carolina*, __ U. S. __, 112 S. Ct. 2886 (1992), and at present, the test requiring just compensation for a Fifth Amendment regulatory taking has remained constant: "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*.'" *Id.*, at 2893-94 (citing *Agins*) This test specifically laid out in the disjunctive has weathered the trial of time. It has been cited, but in fairness not necessarily analyzed, in virtually every decision of this Court while grappling with a regulatory takings issue.

The *Nollan* regulation (permit for construction of ocean front residence conditioned on a public easement across portion of property) exceeded the "outer limits of legitimate state interests" and, as such, constituted "an out-and-out plan of extortion." *Id.*, 483 U. S., at 837. The same held true for the *Dolan* permit to double the size of a commercial store and pave a parking lot conditioned on an easement. Although both advanced legitimate governmental goals of unblocking ocean views to the public, preventing flooding and reducing traffic congestion, neither regulation passed constitutional muster. The disproportionate degree of the regulation to the impact of the proposed development flunked the "legitimate state interest" prong of this disjunctive test triggering the taking feature of the Fifth Amendment. In sum, the Court required compensation for both regulations which exceeded "legitimate state interests" even though the economically beneficial use of the property was preserved.

However, Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), did not stop his analysis after finding that the regulation reviewed (the Kohler Act) failed to advance a legitimate state purpose but delved into a deprivation of use inquiry. Thus, there is arguably conflict between *Nollan* and *Dolan* and its jurisdictional ancestors on this issue which could be resolved here.

As an alternative basis for its ruling, the lower court finds no taking because there was no "deprivation of substantially all economic, beneficial or productive use of the property." *Yardarm*, 641 So.2d, at 1385.[1] This Court has devoted most of its analysis in the area of regulatory takings to the deprivation of economically beneficial use of land. *Penn Central*, 483 U. S., at 104; *Agins*, 447 U. S., at 225; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987); *Lucas*, __ U. S. __, 112 S. Ct., at 2886. No case, to date, from this Court has posed or answered the specific question of whether the failure to advance a legitimate state interest, by itself, will suffice to compel an award of damages for a taking. This case presents the opportunity to do so.

B. Does *First English* Abolish Permanent Regulatory Takings.

The jurisprudence over the last couple of decades generated in regulatory takings cases focused on the remedial

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[1]The trial court after considering all the evidence at trial and relying on cases from this Court determined that, "While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm, in fact, was denied all use of its property." *Yardarm*, 641 So.2d, at 1383. (A-37). The appellate court reweighed the evidence and reached a different conclusion.

aspects of takings, e.g. whether the remedy was simply to invalidate an offending regulation as a substitution for compensation. This topic was raised from 1980-1987 without decision. *Agins*, 447 U. S., at 263; *San Diego Gas*, 450 U. S., at 630; *Williamson*, 473 U. S., at 185; and *MacDonald, Sommer & Frates v. Yolo County*, 477 U. S. 340, 348 (1986).

The dissenting opinion of Justice Brennan in *San Diego Gas* discussed the merits of this question and recognized that, "Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." *Id.*, 450 U. S., at 655. He further observed that, "Invalidation hardly prevents subsequent unconstitutional regulations by the government entity," allowing it to simply amend the offending regulation and start anew, and so on, theoretically *ad infinitum*. *Id.*, 450 U. S., at 655, n.2.

The resolution of this remedial controversy culminated in *First English*, 482 U. S. 304 (1987). Although *First English* dealt with a regulation which was considered to advance a legitimate state interest, it nevertheless reaffirmed the government's right to abandon its intrusion, discontinue its regulations, or acquiesce in a judicial pronouncement that its regulation is unlawful. Given this, the Court warned that "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *Id.*, 482 U. S.,at 317.

This petition seeks review to address the other side of this coin tossed in *First English*: The government's right under the Just Compensation Clause to insist that a permanent taking be deemed a temporary taking. Stated differently, does *First English* and its progeny bar a permanent taking where land-use

regulations, repeatedly judicially invalidated, persist, causing a foreclosure of the land and total loss of the fee simple interest in the property.

It falls within the government's prerogative to ward off a permanent taking and, at best, relegate it to a temporary status by completely backing off its regulatory scheme or, at the very least, shifting its regulatory gears into neutral. Thus, in theory, if the government backs off, the landowner is made whole and continues with his project, there should be no permanent taking. But the question becomes where, as here, the sovereign opts not to back off, and continues to implement the regulatory scheme, must it compensate for the permanent effects of its chosen course?

When the regulator chooses not to institute eminent domain proceedings, but instead elects to place a heavy governmental thumb on the head of one of its citizens causing a complete loss of property by foreclosure, there can be nothing at all temporary about the nature of the taking. For example, in the instant case, Pompano decided against condemnation proceeding because of the huge expense in condemning one of the ten busiest restaurants in the state to convert the land to its present, not for profit, use as a City Park. It used its regulatory powers to achieve the same objective. Thus, we have the flipside of *First English*: can the government by repeated regulation convert temporary takings into permanent takings?

C. If Permanent Regulatory Takings Still Exist, Do The Standards Differ From Temporary Regulatory Takings.

Should this Court decide that the failure to advance a "legitimate state interest" cannot alone establish a taking

without some deprivation of use, then this case presents an opportunity to provide appropriate boundaries. The decision below, by eliminating "legitimate state interest" from the inverse condemnation equation focused on the offending regulations' impact on the economic use of the property. Just as *Nollan* drew the boundary on what exceeded "the outer limits of 'legitimate state interests' in the takings and land-use context," *Id.*, 483 U. S., at 837, the Court here can set the "outer limits" of denial of "economically viable use of property."[2] Of particular national importance would be a determination as to whether the degree of deprivation differs in temporary as opposed to permanent takings.

The Florida appellate decision below rationalized that, "While Yardarm's evidence may have demonstrated Pompano Beach's determined opposition to Yardarm's construction of an eighteen story hotel, there is no evidence of obstruction of any other use." *Yardarm*, 641 So.2d, at 1385-86. In other words, despite a 13 year, $6 million effort to build its hotel, Yardarm's arguable ability to build a lemonade stand precludes constitutional compensation. If the remarkable pattern of regulation pressed by this City over a twelve year period to delay and defeat a legally viable, reasonably expected and investment-backed hotel project stops short of going "too far," conceivably no scenario of regulatory interference banning an otherwise permitted use can invoke the constitutional imperative of just compensation.

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[2] This invites inquiry into the "economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations... [as well as] the character of the governmental action," *Penn Central*, 438 U. S., at 124, all of which become more obvious if not *per se* when property has been taken permanently and not merely temporarily.

This case presents a veritable wonderland for setting the analytical boundary limits in this area of law. Through it the court can address such questions as whether the complete loss of a legally authorized expectation use constitutes a taking, and whether the standards for denial of use (characterized interchangeably as "economically beneficial," "economically viable," "all," "commercially impractical", etc.) are more stringent in the context of temporary takings than for permanent ones. To exact constitutional compensation in the face of retaining the interest in land, at least theoretically, should be more difficult than where the land as well as the expectation use vested therein has been forever appropriated to the public at the expense of the individual landowner.

D. Can A State Avoid Paying Just Compensation By Deeming A Permanent Taking To Be A Series of Temporary Takings And, Thus, Ripe Before The Effects Of The Former Become Certain.

This Court has not passed upon any minimum standards for when an inverse condemnation claim can be time barred for almost 48 years - the last time being to reject a statute of limitations defense to a judgment "of just compensation for the taking of private property by the Government." *United States v. Dickinson*, 331 US. 745, 747 (1947). Almost a half century later, the complete lack of uniformity on this issue throughout the country[3] coupled with the expanding area of regulatory

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[3]For example, even in the more empirical area of "physical invasion" takings, the country is divided over how and when to time bar such claim. Charles C. Marvel, Annotation, *State Statute of Limitations Applicable To Inverse Condemnation Or Similar Proceedings By Landowner To Obtain Compensation For Direct Appropriation Of Land Without The Institution Or Conclusion Of Formal Proceedings Against Specific Owner*, 26 A.L.R. 4th 68(1983).

takings beckons an update. The question is not how many years comprise a time bar but when, at the earliest, can the clock start for Fifth Amendment purposes when a taking is effectuated over a continuous period of time. Also, of national importance is whether the clock begins to run at different times depending on if the takings claim is temporary or permanent in nature?

We know that the clock cannot begin to tick before a taking claim becomes ripe. *Williamson*, 473 U. S., at 172; *Yolo*, 477 U. S., at 340. *See also Pennell v. San Jose*, 485 U. S. 1, 10 (1988) (without a showing as to the consequences of the regulation no case is presented for a takings claim). Ripeness requires the governmental entity charged with implementing the regulations to reach a *final* decision regarding the application of the regulations to the property at issue. Finality means when "the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson*, 473 U. S., at 193.

We also know that a different set of standards will apply when the source of the taking is not a single event but a continuing process of events. As declared more than four decades ago in *Dickinson*, "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.' *Id.*, at 749. In *Dickinson*, the government caused a permanent flooding to land by constructing a dam with the purpose of raising the river level to make it more navigable. Until the "consequences of inundation have so manifested themselves that a final account may be struck," suit could be postponed. *Id.*

In the case at bar, Pompano did not physically invade Yardarm's property until it purchased the land for a song at foreclosure. Before then, Pompano continually "flooded" Yardarm's land with a barrage of regulations designed to kill the hotel project and enable the government to ultimately own the land for a portion of its actual worth. At the earliest, until the City's last revocation of Yardarm's hotel permit became final on October 30, 1985, Yardarm's taking claim lacked *Williamson* ripeness. Under *Dickinson* and *San Jose*, Yardarm was required to postpone suit until its damage/injury became certain (e.g. loss of property through foreclosure), as the fruits of the City's forbidden regulations were not yet realized.

The decision below puts another spin on this analysis by throwing the temporary versus permanent distinction into the fray. It held that, "If its property were effectively 'taken,' Yardarm was not obliged to keep suing to invalidate the City's decision ... damages were available for the 'temporary taking.' "*Yardarm*, at 1387. Aside from the fact that *First English* was not decided until approximately 6 years after the court started the statute of limitations, and two years after Yardarm's temporary taking claim was barred, this reasoning begs the question of whether permanent takings are foreclosed by *First English*. *See* Section B above.

Assuming Florida had a cause of action for temporary takings prior to *First English* (which it did not), the real question is whether a landowner *must* bring multiple cases for temporary taking each time its permit is revoked and eventually reinstated, as happened here. The question is particularly compelling when the true extent of the injury did not become complete until the total loss of the property through foreclosure. *Dickinson* says no and should be applied to regulatory takings as well as physical invasion takings. *First English* arguably

says yes, but only if the government imposing the offending regulation(s) no longer does so.

Pompano retained every opportunity to back off, stop and reverse its course of regulatory behavior against this project. It chose not to do so and instead continued to wage its regulatory war against the property. After repeatedly throwing Yardarm off the wall, at the point of a foreclosure, all the king's horses and all the king's men couldn't put Yardarm together again.

The court below would place those aggrieved by takings into a perennial "Catch 22" by foreclosing their right to sue until finality and consequential injury are achieved, but then time barring a claim once ripe because it's too late. As announced in *Dickinson*, "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die." *Id.*, at 748. As the trial court in this case succinctly stated, Yardarm was denied the right to be "dealt with fairly by his government," - precisely what the Fifth Amendment guarantees but the lower court deprives.

If the decision below goes unreviewed it will mean that regulatory stubbornness causing five reviews by the City's building department, three proclamations from the County Board of Rules and Appeals, a Corps of Engineers' assessment, three permit revocations, seven trial court adjudications and four appellate reviews culminating in the loss of private property by foreclosure still falls short of going "too far."

Notice of the inequities of this case already extend outside the State of Florida. After digesting the opinion below, one national commentator wrote, "If ever you need an example of

outrageous pettifoggery that refuses to look at the facts as a whole and simply ignores common sense and the most rudimentary notions of equity, look no further than this opinion." Prof. Gideon Kanner, Case Digest (Ed. Note) *Just Compensation*, December, 1994, at page 5. Respectfully, even James Madison would agree.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 28, 1995

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

YARDARM RESTAURANT, INC.

Petitioner,

V.

CITY OF POMPANO BEACH, FLORIDA

Respondent.

On Petition For a Writ of Certiorari
To the District Court of Appeal
Fourth District of Florida

APPENDIX TO PETITIONER'S BRIEF

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YARDARM RESTAURANT, INC.,
Petitioner,

v.

CITY OF POMPANO BEACH,
Respondent

Case No. 84,543

Supreme Court of Florida
District Court of Appeal,
4th District — No. 91-1829
Monday, January 30, 1995

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING AND WELLS, J.J., concur

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court

BH
cc: Hon. Frank J. Habershaw, Clerk
Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. C. Lavon Ward, Judge

Mr. James C. Pilkey
Mr. Randolph Adams
Mr. Earl Faircloth
Mr. Anthony J. Carriuolo
Mr. Henry Latimer
Mr. Gale Ciceric Payne

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CITY OF POMPANO BEACH,
Appellant,

v.

YARDARM RESTAURANT, INC.,
Appellee.

Case No. 91-1829

July Term 1994

Opinion filed September 9, 1994

Appeal from the Circuit Court for Broward County,
C. Lavon Ward, Judge.

Henry Latimer of Eckert, Seamans, Cherin & Mellott,
Fort Lauderdale, for Appellant.

Gale Ciceric Payne and James C. Pilkey of Payne, Pilkey
& Associates; Earl Faircloth and Randolph W. Adams,
Fort Lauderdale, for Appellee.

Griffin, J., Associate Judge.

This is the appeal of a non-final order[1] in a non-jury action finding the City of Pompano Beach ["Pompano Beach" or "City"] liable for the inverse condemnation of property owned by the Yardarm Restaurant, Inc. ["Yardarm"]. We reverse because the record fails to establish the requisite taking and because any "taking" claim would be time barred.

Yardarm, which was held in equal shares by brothers Jim and Tom Stephanis, had operated a successful restaurant[2] in Pompano Beach from 1959 until 1972 on a parcel of land that overlooked the Hillsborough Inlet with a view of the Hillsborough Inlet lighthouse [the "east parcel"]. In 1972, Yardarm decided to make a more profitable use of its property by building a European-style grand hotel and marina on the property. Yardarm's initial plans, which called for an eighteen story, 165 room hotel and marina, were submitted for approval to Pompano Beach in February 1973.

Yardarm's plans were met with vigorous public opposition, especially from a condominium association across from the Yardarm which feared that the hotel and marina would block its members' view of the inlet and lighthouse. In apparent response to the opposition, on May 1, 1973, the Pompano Beach commission passed an ordinance imposing a ten-story height restriction on new buildings in Pompano Beach.

Yardarm applied for an exception to the ordinance, and despite continued opposition to the plan, on October 2, 1973, Pompano Beach passed ordinance number 73-96, which had the effect of granting a special use exception to Yardarm allowing the construction of an eighteen story hotel. Yardarm received a building permit for the project on February 14, 1974, as well as a permit for its docks and quays. Four days later, however, Pompano Beach revoked the permits due to claimed "admini-

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[1]The damage issue has yet to be tried.

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[2]The restaurant was consistently named one of Florida's best. In 1976-1977, its final year of operation, it grossed more than $1,000,000.

strative oversights," including a dispute over the number of parking spaces required for the project. In June 1974, Yardarm filed suit in Broward Circuit Court against Pompano Beach to force the issuance of its permit.

Two years later, in September 1976, the court ruled that, although Pompano Beach had "the right, and probably the duty," to rescind the permit it had issued on February 14, 1974, Yardarm was "entitled to apply for a new permit upon the presentation of plans that [were] in compliance with the building and zoning laws that were applicable on February 14, 1974." The court observed that the omissions and errors contained in Yardarm's plans were "such that the Building Official ordinarily would not have refused the permit," absent the "obvious desire by the City to oppose the granting of the building permit to the Plaintiff."

Pompano Beach did not appeal the court's decision, and Yardarm resubmitted its plans in September 1976. However, Pompano Beach again refused to issue a building permit, claiming that Yardarm had still failed to provide sufficient parking to comply with the building code, an issue which had not been directly addressed in the court's earlier order. Accordingly, in February 1977, Yardarm sought supplemental relief from the Circuit Court to require issuance of its permit. The court found in favor of Yardarm on the question of parking and Yardarm was issued a building permit on March 15, 1977, the day following the court's ruling.

Due to expenses associated with its fight to obtain the permit and rising construction costs, Yardarm claims it was no longer able to finance construction on its own. Nonetheless, Yardarm decided to proceed with preliminary site work on the project while it sought permanent financing. With its permit finally in hand, in April 1977, Yardarm closed and demolished the restaurant and began preliminary site work on the hotel.

After demolishing the restaurant, however, Yardarm realized that its new permit (unlike the earlier permit) did not contain approval for its seawall, dock and quays. With site preparation

continuing, in May 1977, Yardarm sought City approval of its seawalls and docks. Pompano Beach eventually approved the seawall, but refused to issue a dock permit, as did the Board of Appeals.

In January 1978, now with more than $591,000 invested in the project, Yardarm brought suit against Pompano Beach to require it to issue a permit for construction of the dock. While the lawsuit was pending, Yardarm slowed, and eventually stopped, construction of the hotel, apparently because of estimates that would cost $500,000 more to build the docks after construction of the hotel. In the meantime, Yardarm unsuccessfully continued to pursue permanent financing for the hotel.

Nearly one year later, in December 1978, following trial, the parties stipulated to an order which permitted Yardarm to build a dock seventy-five feet into Hillsborough Bay. However, following entry of the order, Yardarm did not resume construction of the hotel. It now faced hearings before the Corps of Engineers [the "Corps"] on the question of the issuance of a permit concerning the dock. Although Pompano Beach had been required by the December 1978 order to furnish any written assurances to the Corps, Pompano Beach's City Manager not only requested that Yardarm's application for a permit be denied, but requested a public hearing on the issuance of the permit in the event the Corps was undecided on the issue.

The Corps eventually issued the permit, but in July 1979, while the hearings requested by Pompano Beach were still in progress, Pompano Beach determined that Yardarm's building permit had lapsed due to a work suspension in excess of ninety days. In making this determination, Pompano Beach relied on their recently enacted rule that work requirements would not be tolled by litigation between the parties. Yardarm maintained that the applicable rules were those in place in 1974, when it applied for its permit, which rules preserved the permit where a work stoppage was caused by litigation.

Relying on the 1974 rules, Yardarm went back to court in July 1979, asking for an order requiring Pompano Beach to

reissue the building permit. Yardarm apparently lost before the hearing officer, but three months later, in September 1979, the Board of Appeals (which was chaired by Yardarm's architect) reinstated Yardarm's permit.

Pompano Beach appealed the board's ruling and issued a stop work order until an appeal to the Circuit Court was decided. Once the Circuit Court ruled in favor of Yardarm in December 1979, finding that the applicable rules were those in place in 1974, Pompano Beach filed a petition for writ of certiorari to the Fourth District Court of Appeal, and this time Pompano Beach issued a stop work order until the appeal or a subsequent appeal (if one was taken) to the supreme court was decided.

While the appeal was pending, Yardarm unsuccessfully continued to cast about for financing for the project. Construction costs had assertedly risen from $4.3 million in 1974 to more than $14 million in 1980. Nevertheless, Yardarm's advisors recommended the owners purchase a second parcel, west of the property Yardarm already owned, when it became available. They believed it would make the project more attractive to institutional lenders and would enable Yardarm to sign a management contract with a major hotel chain. In order to finance the purchase, however, Yardarm would have to mortgage the east parcel. Yardarm purchased the west parcel on February 14, 1981.[3]

Five months after Yardarm purchased the west parcel, in July 1981, the Fourth District Court of Appeal ruled on Pompano Beach's petition for writ of certiorari, which was directed solely to Pompano Beach's contention that the board's original order was not supported by substantial competent evidence. The court agreed with Pompano Beach that no true "evidence" had been presented to the board since the parties had relied on the argu-

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[3]Yardarm was actually able to purchase only two of the three parcels which made up the west side. It obtained a long-term lease of the third parcel, and this lease ultimately became a problem in Yardarm's attempts to obtain financing.

ment of counsel. Nonetheless, the court held that since Pompano Beach had actively participated in the proceedings before the board without objection, it could not "be heard to complain about the meeting's irregularities," and denied the petition.[4]

Approximately two weeks after the Fourth District's ruling on July 16, 1981, Yardarm's building permit for the east parcel was reissued by Pompano Beach. Because of its intervening purchase of the west side property, however, Yardarm had to redraw its plans and attempt to obtain plat approval for a building on the west side. Yardarm continued to pursue financing, this time for the consolidated project.

Recognizing that at this point it had little chance of obtaining permanent financing without a partner to guarantee its loan, Yardarm turned to Ralph Mann and Ron Schroeder of the Glen Ivy Financial Group. Mann and Schroeder agreed, in exchange for a percentage of hotel profits, to let Yardarm use their financial statements in order to obtain financing. Bank of America in San Francisco suggested Ridge Mortgage in New Jersey, a company allegedly having access to union funds. Ridge Mortgage required Yardarm to deposit in excess of $200,000 as an application fee. This turned out to be a scam and Yardarm lost the $200,000 commitment.

Following the problems with Ridge Mortgage, Yardarm continued to submit loan packages; however, because Yardarm had been required to take on a partner, it refused to consider any loan which would not fully compensate it up front for the property and repay its costs—a total of approximately $6,000,000.

Despite its continuing problems, Yardarm received two substantial offers to buy its stock in 1983. On April 28, 1983, Yardarm received an offer for $6 million for Yardarm's stock with an assumption of Yardarm's outstanding $2.2 million mortgage. This offer was withdrawn on May 5th, 1983, when the buyer learned that there was an outstanding option to purchase

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[4]*City of Pompano Beach v. Broward County Bd. of Rules and Appeals.* No. 80-145 (Fla. 4th DCA July 1, 1981) (unpublished order).

the property which had been given by Yardarm. Yardarm received an offer from a second purchaser in August 1983, for $8,000,000. Yardarm rejected the offer because it felt it was too low.

While Yardarm allegedly waited for approval of its west side permits, it took out a number of short term loans to fund the minimal construction necessary to prevent its permit on the east side from being revoked for lack of work and to pay its consultants while it sought approval of the west side. In January 1984, Yardarm took out the last of its loans, a $2.8 million loan with Sunrise Savings and Loan ["Sunrise"], part of which was used to retire Yardarm's prior loans; the remainder was used to fund sufficient construction to keep the east side permit in place.

Yardarm obtained plat approval for the west side in 1982 and site plan approval in 1984, but apparently never submitted an application for a building permit on the west side before Sunrise filed for foreclosure on May 8, 1985. With the property in foreclosure, Yardarm's permit on the east side was again revoked for insufficient work. Yardarm was informed, however, that it could reinstate the permit by refiling plans within 180 days. This deadline set by Pompano Beach would expire October 30, 1985. With the building permits lapsed, Pompano Beach also began to consider repealing the ordinance under which Yardarm had obtained its eighteen story special use exception.

The first reading of the ordinance repealer took place on September 3, 1985, and a second reading was scheduled for October 29th. In the meantime, on October 10, 1985, Yardarm submitted a consolidated plan for construction covering both parcels. Once Yardarm learned, however, that repeal of the special exception ordinance as under consider and with its permit deadline two days away, Yardarm filed suit to enjoin the Pompano Beach City Commission from meeting to repeal the eighteen story ordinance. The trial court granted the injunction on November 20, 1985.

Pompano Beach appealed the entry of the injuction, but gave Yardarm tentative approval for its consolidated plan on

February 26, 1986. By this time, however, a final judgment of foreclosure had already been entered against both properties and a foreclosure sale was set for March 21, 1986. On March 4, 1986, Pompano Beach gave Yardarm site approval for the project and notified that it had 180 days to obtain a building permit for the consolidated project, but on March 20, 1986, Yardarm filed for protection in bankruptcy court. The bankruptcy stay was later lifted and the property was sold in foreclosure to the FSLIC as receiver for Sunrise. As the lower court observed, the ironic end to this sorry saga was that Pompano Beach then purchased the land from the FSLIC. Yardarm estimates that as of the foreclosure, the land was worth $6.2 million.

In July 1987, the Fourth District Court ruled in favor of Pompano Beach in its appeal from the order enjoining it from repealing the eighteen story ordinance.[5] The issue on appeal was whether Pompano Beach's action in attempting to revoke the ordinance involved a gross abuse of discretion. Yardarm apparently argued that Pompano Beach was estopped from revoking the ordinance as to Yardarm. In holding that Pompano Beach was not estopped, the court found: (1) Pompano Beach's earlier obstructionist tactics would not form the basis for an estoppel since those tactics ceased in 1979 and Yardarm had still failed to make any real progress on the hotel in the intervening years; (2) Pompano Beach's refusal to process the application in 1985 could not form the basis for an estoppel since Pompano Beach was entitled to delay issuance of the permit given that a zoning change was in progress; and (3) Pompano Beach was not equitably estopped from revoking the ordinance (exception) as to Yardarm because there had been no showing that Yardarm had incurred "extensive obligations" or undergone such "a change in position" so as to make the doctrine applicable.

On September 15, 1987, Yardarm filed the instant action against the City of Pompano Beach for inverse condemnation of

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[5]*City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So. 2d 1295 (Fla. 4th DCA 1987).

its property. The complaint alleged that Pompano Beach's extended obstruction of Yardarm's attempts to build its hotel and marina had worked an inverse condemnation of Yardarm's property of both a temporary and a permanent character.[6] Pompano Beach denied any taking had occurred, and asserted a number of affirmative defenses, including res judicata, collateral estoppel, law of the case and the statute of limitations. When Yardarm ultimately identified the precise date of taking as October 30, 1985, the date on which its right to reinstate the building permit on the east side expired, Pompano Beach also asserted the defense of failure to exhaust administrative remedies.

At trial, Yardarm's case was based on evidence that City officials had willfully obstructed construction on the east side from at least 1974 through 1981; that after 1981, the City harassed Yardarm continually; and that Yardarm repeatedly tried to obtain financing for the entire property from 1981 through 1985 but could not do so because of Pompano Beach's earlier activities. Pompano Beach's case centered on evidence that its obstructionism had ended, at the latest, in 1981; that Yardarm's inability to obtain financing was due to a number of causes unrelated to Pompano Beach's earlier actions; and that Yardarm had ultimately lost the property because it had mortgaged the east side property to buy the west side. Pompano Beach also presented evidence concerning the offers to buy both properties for $8,000,000 which Yardarm had rejected in 1983.

In its final order, the court found that Pompano Beach had effected a permanent taking of Yardarm's property on October 30, 1985, based on its history of obstructing the issuance of Yardarm's permit. The final judgment expressed the lower court's reasoning:

As to the taking, Yardarm's cause is pregnant with

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[6]A second count under 42 U.S.C. § 1983 was disposed of before trial based on Yardarm's failure to exhaust its state remedies prior to filing suit. Yardarm's federal takings claim was dismissed for the same reason.

equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building Official; however, the City's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant reponsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. *See Hollywood Beach Hotel* case.

The first factor to be taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has on the claimant. In this case, Yardarm and its stockholders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Penn Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, it was purely political. The Hillsborough Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsborough Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied

on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought defeat on those commissioners who voted in favor of constructing the hotel.

Similarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary," "aesthetic," and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the court went on to state that if the regulatory action had invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* its property.

To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the City Manager got involved when it was not his duty to do so; the Mayor was concerned about getting re-elected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm in fact was denied all use of its property. Time and time agaain civil actions had to be

brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's purpose. Illegal acts of certain City officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would have not have allowed it.

Counsel for the City have cited the case of *McNulty v. Town of Indiatlantic*, 727 F. Supp. 604, in support of their position that the property owner was not denied all use of his property. As in the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

We[7] begin by stating the obvious — that the final judgment of a "permanent taking" based on obstructionist tactics of Pompano Beach is unorthodox for many reasons. First, Yardarm did not own the real property that it claimed the City had "taken;" it had been lost to Yardarm's lender through foreclosure. More important, it involves a claim that Pompano Beach's improper abuse of its permitting power to prevent Yardarm from building an eighteen story hotel was a "taking." Finally, Yardarm's claim depends on the notion that the City did not "take" Yardarm's property until the landowner "gave up" trying to put an eighteen story hotel on it.

The threshold question presented is whether Yardarm's claim can support a judgment for inverse condemnation. We hold that it cannot. Inverse condemnation is a cause of action in favor of a property owner against an agency having the power of

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[7]After an oral argument, the entire Fourth District Court of Appeal rescued itself and a panel of the Fifth District Court of Appeal was assigned by the Chief Justice to sit as the Fourth District Court to decide the case. Because of the lapse of time and the pace of developments in this area of the law, the new panel allowed rebriefing and held a second oral argument.

eminent domain to recover the value of property that has been *de facto* taken, by the agency, even though no formal exercise of the power of eminent domain has been attempted. *City of Jacksonville v. Schumann,* 167 So. 2d 95 (Fla. 1st DCA 1964), *cert. denied,* 172 So. 2d 597 (Fla. 1965). A "taking" in Florida requires the deprivation of substantially all use of the property alleged to have been taken. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* 19 Fla. L. Weekly S169 (Fla. April 7, 1994); *Askew v. Gables-by-the-Sea, Inc.,* 333 So. 2d 56, 61 (Fla. 1st DCA 1976), *cert. denied,* 345 So. 2d 420 (Fla. 1977).

This is not a typical case where a public body's land use regulation has gone "too far,"[8] depriving an owner of substantially all use of his land. The lower court incorrectly ruled that a judgment for inverse condemnation could be had, even in the absence of a deprivation of substantially all use of Yardarm's property, if Pompano Beach's interference with Yardarm's plan for development were an invalid exercise of its police power. This was an understandable error given that "takings" law is one of the most confused areas in America jurisprudence. Confusion on this issue may have arisen, in part, from the notion that a valid exercise of the police power regulating the use of property can give rise to no remedy unless the landowner suffers a deprivation of substantially all use of his land. Somehow, the converse of that proposition found its way into the analysis — if not the holdings — of several appellate decisions. Confusion surely has also resulted from language used loosely in the cases.[9] Recent deci-

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[8]*Pennsylvania Coal v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

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[9]*Compare Agins v. City of Tiburon,* 447 U.S. 225, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980), with the case it relies upon, *Nectow v. City of Cambridge,* 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), which invovled an *injunction* against the improper exercise of the police power. *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 123, 98 S. Ct. 2646, 2658, 57 L. Ed. 631 (1978); *Nollan v. California Coastal Comm'n.,* 483 U.S. 825, 834 n.3, 107 S. Ct. 3141, 3147 n.3, 97 L. Ed. 2d 677 (1987).

sions make clear, however, that the *sine qua non* for inverse condemnation is a "taking" — whether a valid exercise of police power or not, whether temporary or permanent.

In Florida, any uncertainty on this point was dispelled by the Supreme Court in *Tampa-Hillsborough County Expressway Authority,* 19 Fla. L. Weekly at S171. In that case, a land use regulation previously had been struck down by the high court as an invalid exercise of the police power. Here, the lower court determined that the City's actions were "illegal," "arbitrary and capricious," "not taken to promote the public's health, safety or welfare," "frivolous," "dilatory" and a "usurpation of authority." Although speaking in terms of a "taking," the fact findings of the lower court are a classic expression of a denial of due process. *Corn v. City of Lauderdale Lakes,* 997 F. 2d 1369, 1374 (11th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 1400, 128 L. Ed. 2d 73 (1994). The lower court correctly perceived that the law provides a remedy for such conduct but, unless there is a deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy. If an *invalid* exercise of police power causes damage not amounting to a "taking," the claim is for a violation of substantive due process and the remedy is monetary damages. *See e.g., Eide v. Sarasota County,* 908 F. 2d 716, 720-722 (11th Cir. 1990), *cert. denied,* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991). *See also Tampa-Hillsborough County v. A.G.W.S.,* 608 So. 2d 52, 57 (Fla. 2d DCA 1992) (Altenbernd, J., dissenting).

An example of the correct legal analysis application to this kind of case can be found in *Bello v. Walker,* 840 F. 2d 1124 (3rd Cir.), *cert. denied,* 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988). The plaintiff was the developer of a multi-phase housing project. It had submitted a site plan for five phases, obtained building permits for phase one and completed construction. When subsequent application was made for phase five of the project, however, the building permit was denied on the ground that the developer had failed to plan the build-out of the

phases in numerical order. Evidence suggested that the town council had made the decision to deny the permit because some of the members wanted to discourage multi-unit housing and because two members of the council had personal animosity toward one of the developer's employees, who was their political rival. Eventually, the developer obtained a court order requiring the issuance of the permit.

The developer also filed suit against the City and the individual council members, asserting deprivation of due process and equal protection, pursuant to 42 U.S.C. § 1983, violation of federal antitrust laws and inverse condemnation. Summary judgment was entered in favor of all defendants on all claims and the developer appealed. The Third Circuit Court of Appeals ruled that the claim for violation of substantive due process, alleging governmental action that was arbitrary, irrational, and tainted by improper motive, including partisan, political or personal reasons unrelated to the merits of the application for the permits, would support a claim under 42 U.S.C. § 1983. *Id.* at 1128-29. *See also Brady v. Town of Colchester,* 863 F. 2d 205, 215-16 (2d Cir. 1988).

In contrast, the Third Circuit upheld the summary judgment in favor of the defendants on the "taking" claim, noting that the plaintiffs could not make out a claim that their property had been "taken" without just compensation because they had merely been denied a particular building permit. Because they retained the right to put their land to multiple alternative uses, the municipality's actions could not have been said to have denied them all use of their property. *Id.* at 1131.

Although the lower court in this case principally ruled that Yardarm need not prove a denial of all use of its land because Pompano Beach's actions were improper, the court also attempted to fit within the "takings" cases by finding that "[i]n this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, Pompano Beach would not have allowed it." This finding is simply not supported by any evidence in the record. While Yardarm's evidence may have demon-

strated Pompano Beach's determined opposition to Yardarm's construction of an eighteen story hotel, there is no evidence of obstruction of any other use. Yardarm was in fact using the property for an alternative use — the restaurant — through April of 1977. There was always the ability to build a ten story building. In addition, Yardarm was in possession of a valid permit to build an eighteen story hotel on the east side from July 1981 until March 1985. No permit for the west side was ever applied for.

As alluded to in *Bello, supra.* in cases involving permit denials, it is usually difficult for a claimant to establish a "taking." A sister court in Oregon recently explained:

> [W]ith rare exceptions, no particular denial of an application for a use can demonstrate the loss of all economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permissible by the regulations.

Nelson v. City of Lake Oswego, 869 P.2d 350 (Or. App. 1994). *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 136-137, 98 S. Ct. 2646, 2665-2666, 57 L. Ed. 2d 631 (1978).

Total takings based on the denial of a permit are appropriate where the evidence shows that a city intends to deny *all* permits for development as an indirect method of dedicating property to a public purpose. *See, e.g., Vatalaro v. Department of Envtl. Regulation,* 601 So. 2d 1223 (Fla. 5th DCA) (holding permit denial was taking requiring compensation where language used in denying permit made it clear that only use for ecologically sensitive land was to look at it), *review denied,* 613 So. 2d 3 (Fla.

1992).[10] A "taking" may also be found where a landowner is denied a permit for the only feasible use of the land, thereby effectively denying him or her the "economically viable" use of the land. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985) (recognizing principle); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F. 3d 1536, 1549 (11th Cir. 1994) (property was "completely unusable" after lapse of PUD zoning). *See also Alexander v. Town of Jupiter*, 19 Fla. L. Weekly D1049 (Fla. 4th DCA May 11, 1994) (landowner denied permit to clear land to remove trees that would permit survey.)

Even if the earlier denials of building of dock permits by Pompano Beach could have constituted a "taking" of Yardarm's property, all requested permits had been issued by 1981. The trial court made no findings concerning any further obstruction by the City. Rather, the court focused on Yardarm's inability to obtain financing after 1981 due to the City's "hostility" to the project. The inability to obtain financing may be caused by a "taking" or may be some evidence of a "taking," but it is not a taking. *See Southpark Square, Ltd. v. City of Jackson*, 565 F. 2d 338, 343 (5th Cir. 1977), *cert. denied*, 436 U.S. 946, 98 S. Ct. 2849, 56 L. Ed. 2d 787 (1978). In *Southpark*, the court considered the "novel" question of "whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is compensable taking." *Id.* at 342. The court rejected the claim, reasoning:

> A city could be unduly hamstrung if its permit decision subjected it to potential liability on the basis of finan-

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[10] *Accord Kraft v. Malone*, 313 N.W.2d 758 (N.D. 1981) (by denying building permit in city, city had effectively taken property for public park and drainage ditch); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (finding taking where city denied permit specifically to preserve area as scenic easement for benefit of public and to prevent development of any kind). *See also Karatinos v. Town of Juno Beach*, 621 So. 2d 469 (Fla. 4th DCA 1993) (finding that city was not cause of taking where city engineer testified that state would never have permitted construction of any building on property), *review denied*, 634 So. 2d 625 (Fla.), and *cert. denied*, ___ U.S. ___, 114 S. Ct. 2133, 128 L. Ed. 2d 864 (1994).

cial rrangements independently made by property owners affected by those decisions.

Id. at 343. As explained above, if Yardarm was placed in financial difficulty as a result of the City's prior unlawful acts, it had to pursue a damage remedy; its land had not, however, been taken by Pompano Beach.

Finally, Yardarm's alleged inability to obtain financing is not the type of negative economic impact compensable as a taking. *See Highland Beach,* 18 F. 3d at 1536. For the period after 1981, Yardarm is not only unable to show that it was denied any particular use of its property, but it is unable to establish a negative economic impact on land value resulting from Pompano Beach's actions. The Federal Circuit Court of Appeals has recently held that the issue of negative economic impact requires consideration of the relationship of the owner's basis or investment and is measured by the change, if any, in the fair market value before and after the "taking." *See Florida Rock Indus., Inc. v. United States,* 18 F. 3d 1560 (Fed. Cir. 1994). Yardarm itself estimated that the value of its property rose from $5 million in 1981 to $6.2 million in 1985, and it rejected an offer for the property of $8 million in 1983 because it thought it was too low.

Also relevant to our conclusion that there was no "taking" in this case, as a matter of law, is the date this "taking" was found by the lower court to occur: the date of expiration of the City's 180 day deadline within which to reapply for a permit after the east parcel permit had lapsed for lack of work. This date is not tied to any particular act on the part of Pompano Beach; rather, it appears to represent the date Yardarm decided to (or had to) "give up." Yardarm contends that, under Florida law, the date of a "taking" is the date a landowner quits struggling against the condemning authority's confiscatory regulation. This argument, however, is merely a misapplication of the ripeness doctrine. Ripeness and persistence are not the same thing. Ripeness is required in regulatory taking cases because a court is unable to determine whether a regulation "goes too far" for purposes of a regulatory "taking" analysis until it has been determined exactly

how far the regulation has gone. Ripeness does not require Yardarm to engage in years of litigation with the City. Once Yardarm had made a definite and meaningful effort to obtain City approval for its eighteen story hotel and Pompano Beach had evinced an intention not to give it, Yardarm's claim was ripe.[11] If its property were effectively "taken," Yardarm was not obliged to keep suing to invalidate the City's decision, although it was privileged to do so. If, while in force, the City's invalid actions caused a "taking," damages were available for the "temporary taking." *Lucas*. Here, by 1981, the permit refusal had ended and the permit was in hand.

The probable reason for the court's selection of the date of "taking" was Pompano Beach's statute of limitations defense. In rejecting this defense, the lower court relied on *Askew*.[12] On appeal, Pompano Beach again contends that, even if there were a permanent total "taking" in this case, this action is barred by the statute of limitations. In making this argument, Pompano Beach asserts that the applicable statute of limitations is the four year statute pertaining to either "[a]n action founded on a statutory liability," 95.11(3)(f), Fla. Stat. (1985), or the four year statute applicable to "[a]ny action not specifically provided for in these statutes." § 95.11(3)(p), Fla. Stat. (1985). Pointing out that Yardarm's permit for the east side was reinstated on July 16, 1981, and that the permit remained in effect until May 1, 1985, when it was revoked by operation of law, Pompano Beach maintains that there clearly was no "taking" in the four year

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[11] *See generally* Note, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. of Land Use & Environmental Law 101, 115-27 (Fall 1993). Yardarm itself has argued that by June 1974 it had become "obvious" that Pompano Beach had "no intention to reissue the permit to build the hotel . . ."

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[12] *Askew* is inappropriate to the facts of this case, however. Although the pattern of conduct may have been similarly lengthy on the part of the state, the triggering event, which was opposition to the Corps of Engineers' extension of the landowner's dredge permit, occurred within the statute of limitations. The statute of limitations was no an issue in that case.

period preceding Yardarm's commencement of the action and that, consequently, the action is barred.

Yardarm agrees that the appropriate statute of limitations, if any,[13] is four years, but it contends that Pompano Beach's limitations defense is "nonsensical" in that "Yardarm could not bring a taking case against Pompano Beach because it kept winning." Relying on *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982) and *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984), Yardarm contends that a cause of action for inverse condemnation does not accrue until a property owner stops challenging the action taken by the government in opposition to development. *Albrecht* and *Key Haven*, however, really have no application to this issue and do not support Yardarm's theory. *Albrecht* simply stands for the proposition that, assuming a deprivation of all use of the land has already taken place, the landowner has two choices: to try to undo the taking or to seek compensation. This remains true, if incomplete, in light of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Now it is clear that the landowner may seek compensation for the period while there was a deprivation of use before the taking was undone. It does not mean, however, that the statute of limitations for a "taking" does not begin to run so long as the landowner opposes the agency action that has worked a "taking."

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[13] *See generally* Charles C. Marvel, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriate of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner*, 26 A.L.R. 4th 68 § 2 (1983). The argument for the statute of limitations is inapplicable to actions for inverse condemnation has previously been rejected by the Florida Supreme Court. *See, e.g., Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393 (Fla. 1932) (actions for inverse condemnation are subject to both the statute of limitations and the doctrine of laches). This case is a good illustration of why a statute of limitations is appropriate in these types of cases; here, several of the key witnesses had died or become unavailable years before this action was brought.

The statute of limitations issue in this case first requires consideration of when the City took any action that deprived Yardarm of substantially all use of its land. Assuming arguendo that the answer is something other than "never," it is at least clear that, on the date suit was filed, September 15, 1987, the statute of limitations had run as to any "taking" that occurred earlier than September 15, 1983. Any "taking" occurred when the permit was denied and Yardarm lost its right to develop, *Vatalaro,* 601 So. 2d at 1229, and ended in 1981 when the permit was reissued.

The final question is whether the City took any separate action that rose to the level of a "taking" after September 15, 1983. We can find nothing in the record that would support a finding that there was a "taking" by the City after that date. Contrary to the view taken by the lower court, in this type of case, there can be no "domino effect" or "piggybacking" of all the offenses of prior years so that previous, time-barred "temporary takings" turn into a permanent taking whenever the regulatory authority takes any new action adverse to the developer and the developer decides he has had enough. If Yardarm had a "taking" claim for what happened up to July 16, 1981, it had until July 16, 1985 to bring it.

Because this case is before us on appeal from a non-final order and because we reverse that order, the case is remanded to the lower court for further proceedings. We note that the lower court previously had entered an order granting partial summary judgment on Yardarm's due process claim brought under 42 U.S.C. § 1983 based on the City's contention that such a claim would be "premature" until the "taking" claim was disposed of. Although we express no opinion about the merits of a due process claim on this factual record, in light of our opinion, Yardarm is entitled to reconsideration of the summary disposition of this cause of action.[14]

REVERSED and REMANDED.

COBB, W., and PETERSON, E., Associate Judges, concur.

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[14]We find no merit in the issue on appeal pertaining to the improper use of deposition testimony. We do not reach the *res judicata*/collateral estoppel/law of the case issue because our decision makes it unnecessary.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL COURT IN AND FOR BROWARD COUNTY, FLORIDA

YARDARM RESTAURANT, INC.,
Plaintiff,

v.

CITY OF POMPANO BEACH,
Defendant

Case No. 87-19652 (23)

FINAL JUDGMENT

This is one of a succession of cases the parties to this action have litigated since 1973. See Chronology, Appendix "A."

This particular case was commenced by the plaintiff, Yardarm Restaurant, Inc., a Florida Corporation (hereinafter referred to as "Yardarm") against the City of Pompano Beach (hereinafter referred to as "City") for inverse condemnation, an equitable action. The City has denied that there was a "taking" of Yardarm's property and has asserted affirmative defenses of *res judicata* and/or collateral estoppel; also, that the claim is time-barred because the statute of limitations has run.

Factual Background: The property on the east side of A1A, which lies directly next to the Hillsboro Inlet, was purchased in 1959 by the plaintiff corporation. There Yardarm built and ran a very successful restaurant for a number of years. In 1972, Yardarm decided to build an 18 story hotel on this property. In furtherance of this decision, the City's zoning laws, restrictions and regulations were checked and it was determined that no height nor density requirements stood in the way of building an 18 story hotel. Yardarm's plans became well known at City Hall

and were highly publicized in the news media. Almost immediately, opposition to the hotel began to mount.

At this point, it is important to identify the players and their testimony together with other events of 1972, 1973 and 1974.

1. *Jim Stephanis and Tom Stephanis* — Brothers who owned, 50% each, the Yardarm stock and ran the Yardarm Restaurant. They also owned the Wharf Restaurant in Lauderdale-By-The-Sea. Jim was active in the Democratic party and at one time ran for U.S. Congress. He later ran for the Chairmanship of the Broward County Democratic Party;

2. *Walter C. Williams* — Williams was the Chief Building Official of the City of Pompano Beach having held that position since 1969. His duties included supervision of field investigators and issuance of building permits upon building code compliance. He was in charge of the building department and reviewed plans to make sure they complied with the South Florida Building Code.

Williams' first contact with the Yardarm project was in December of 1972 when an associate of the architect assigned to build the hotel called him. Williams made preliminary inquiries concerning the project and determined that the Yardarm application for an 18 story hotel was proper. He issued the permit on February 14, 1974.

In the early morning of the 14th, a meeting was held between certain city officials and the Yardarm people. At this meeting, one participant, Fred Kleingartner, voiced certain objections to the entire Yardaram plan. He held the unofficial title of "Planning Director." These objections were made by Kleingartner but they were at the instance of the Mayor and the City Manager. Despite these objections, Williams approved the permit later that day. At that time, there was neither a height limitation nor a density restriction for the construction of a hotel.

Four days later, February 18, 1974, Williams revoked the permit upon orders given to him by the City Manager. The revocation of the permit was done over Williams' objections and even though the plans had already received approval. When a

second "review" of the plans was made, Williams, again, advised the City Manager and Kleingartner that the Yardarm project was in compliance. However, both men turned deaf ears on Williams' advice. When yet a third "review" was completed, it was again determined that the Yardarm project was in compliance, no permit was issued.

In early May of 1974, the City Manager forced Williams to sign a letter addressed to Yardarm's lawyer in which Williams stated that there were objections to the application. This letter was completely orchestrated by the City Manager and was not agreed to by Williams. Williams was forced to write a second letter which stated that the zoning for the Yardarm property would be changed. After receiving a reply from Yardarm, Williams was again forced to respond and state facts that he did not agree to.

3. *William J. Alsdorf* — Commissioner and Mayor of Pompano Beach. According to the Mayor, the Yardarm permit was granted on February 14, 1974 and revoked 4 days later. This revocation came as the result of the meeting between the City Manager, Fletcher Riley, Fred Kleingartner and the Mayor. The Mayor stated that "Fletcher Riley had no business even attending the meeting because he was only a member of an advisory board." Riley was also a powerful member of the Hillsboro Shores Improvement Association, Inc., which had objected to the Yardarm project because the Association said the hotel would block the homeowners' view of the ocean. The Mayor pointed out that Riley was adamantly opposed to the project and the issuance of the permit. According to the Mayor's testimony, Kleingartner also asserted his negative views of the Yardarm. Mayor Alsdorf was quick to point out that as head of the Community Development Department, Kleingartner had no authority to participate in the decision-making process. In other words, Kleingartner was acting illegally at the City Manager's behest.

The Mayor also stated that the administration, meaning the City Manager and Kleingartner, had not acted wisely nor had

they played by the rules. However, with the upcoming election around the corner, the Mayor was also cognizant that a wrong decision could easily cost him the election. He specifically addressed his statements to a fellow commissioner, Max Ryder, and told him that he needed a good political lesson regarding his vote on the Yardarm. The Mayor was also concerned about the fact that the Republican Club was going to censor two commissioners for their vote in favor of the Yardarm. Incidentally, these two commissioners were defeated in the February 19, 1973 election. The Major also mentioned that certain Republican officials tried to intimidate the only black commissioner regarding this project.

4. *John G. Cartwright* — The testimony of Cartwright, the City Manager, established that he really had nothing to do with the issuance of building permits in his capacity as City Manager but that he made a special exception for the Yardarm project. He stated that he instructed Walter Williams to revoke the building permit after he read "a big article in the paper" and conferred with Fred Kleingartner. Cartwright said that Williams was in disagreement with this position. Cartwright further testified that Kleingartner was serving illegally during this period of time.

He stated that Fletcher Riley had put pressure on him regarding the permit and asked him why it had ever been issued at all. Cartwright said that he had discussed the Yardarm with every commissioner during the election and that the Yardarm had become the major political issue. Not coincidentally, Commissioner Williams defeated Commissioner Ryder because of Ryder's position in favor of the Yardarm. He stated that the objections to the three subsequent "reviews" came from himself and the politicians and not from Williams.

5. *C. H. Fletcher Riley* — Riley held the title of Chairman of the Planning Board, with no "official" status. His Board had nothing to do with Yardarm's application. The Board's only official connection with the Yardarm project was to advise the Commission concerning the special exception use. In this capacity, the Board made a recommendation against the exception for

the 18-story hotel.

Despite his lack of "official" status, Riley was very vocal about the permit revocation. According to his testimony, he arrived at City Hall at 8:00 a.m. on February 18, 1974, to confront the City Manager as to how the Yardarm permit could have ever been granted in the first place. He said that he conferred with Kleingartner between the time the permit was issued on the 14th and when it was revoked four days later on the 18th. Riley had a very close relationship with Kleingartner and admitted that Kleingartner was working for the City in an illegal capacity.

Riley also stated that he offered advice which he knew was not his function. He stated that he contributed money to candidates who said they would keep the Yardarm hotel from being built. Those candidates were Ken Williams, William Alsdorf and Herbert Bard. When asked whether he was familiar with an attempt by the Republicans to censor two commissioners and intimidate a black commissioner for their support of the Yardarm, he was instructed by his lawyer, Russell Clark, not to answer the question.

6. *The Hillsboro Shores Improvement Association, Inc.* — A homeowners' group located on the south side of Hillsboro Inlet. They were led by Fletcher Riley, while wearing his "other hat." Riley was the prime mover behind the Association's decision to sue the City. The Association's main objections to the construction of the hotel were that it would block the view of the ocean and also block the light coming from the lighthouse at night.

7. *The Republican Club* — This organization threatened censorship of the commissioners who supported the Yardarm. It also tried to intimidate the lone black commissioner for his support of the Yardarm project.

With regard to the chronology of events that followed, while Yardarm was preparing to make re-application for the building permit, the City reduced the height limitation from 18 to 10 stories. Thereafter, Yardarm applied for and finally received the special exception use to construct an 18 story hotel in

October of 1973. As previously mentioned, this special exception use was vigorously opposed by Riley and the other members of the Hillsboro Association. After a 3-2 vote in favor of Yardarm, the Association filed suit to contest the City's action. Yardarm intervened in this lawsuit which resulted in a decision in favor of the City and Yardarm in sustaining the ordinance which created the special exception use. In early 1974, Yardarm reapplied for another permit. It was during this time that the City Manager, Cartwright, Kleingartner and Riley found technical flaws with the plans. While Williams was the only individual with authority to approve building permits, he was instructed not to approve the permit by the City Manager. This was done by sending a letter to Yardarm which he did not compose but was required to sign. After three such "reviews", Yardarm again resorted to court action and in 1977 the permit was issued after $2^1/_2$ years of litigation in the circuit and Appellate Courts.

At this point, the City commenced to harass the Yardarm people regarding the work in progress, disputes over dock permits and other matters. Yardarm was forced to go back to court to get dock permits. This was in late 1978.

In 1979, the permit was again revoked and Yardarm did not receive it back until July of 1981 after another two years of litigation. Thus, for the first eight years after the permit was originally issued, Yardarm was forced to defend the granting of the permit and special exception use 8 different times either in the lower court of in the Apellate Court. All of these decisions resulted in wins for Yardarm. By this time, it is quite obvious that the City and its officials had become very litigious and hostile toward the Yardarm.

While all of the before-mentioned litigation was pending, Yardarm tried to obtain financing for the construction of the buildings, first on the east side of A1A and then on the west side for the property it had purchased there in 1981. No less than 48 attempts were made at obtaining financing. All attempts for permanent financing failed, although certain other smaller loans were obtained. Several reasons for Yardarm's failure to obtain

permanent financing: 1. The lenders were looking for a bigger project; 2. The cost per room was prohibitive; 3. The configuration of the properties wasn't right, etc. However, by far the biggest and overriding reason given was the City's hostility toward the project. No lending institution wanted to get involved in a community where there had been so much wranging and bitter opposition to the project. Because of this acrimonious atmosphere and the adverse publicity, Yardarm's credibility in the financial community was nil.

In May of 1985, the City advised Yardarm that its permit had lapsed because as the City phrased it, "Yardarm had done minimal work to keep the permit alive." In October of 1985, Yardarm applied for another permit for the construction of the buildings on both sides of A1A. At this time, the City had pending a proposed ordinance to revoke the special use exception which had been granted to Yardarm 12 years earlier. Once again, Yardarm went to court and obtained an injunction against the City preventing it from repealing the special use exception. This decision was appealed by the City and in July of 1987, the Appeals Court reversed the lower court and ruled that the principles of equitable estoppel did not apply and that the City was within its rights to pass the ordinance in question as it was an administrative function of the City.

It should be noted that in May of 1985, Sunrise Savings and Loan Association sued the Yardarm to foreclose the mortgage. On February 20, 1986 Sunrise obtained a judgment of foreclosure with a sale date of March 21, 1986. On the eve of the foreclosure sale, Yardarm filed for protection under chapter 11 in the Bankruptcy court and obtained a stay of the foreclosure proceedings. Thereafter, the stay was lifted and the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver for Sunrise, purchased the property and then sold it to the City (irony of all ironies). This suit followed in 1987.

ISSUES:

1. Whether there was a taking of the property in question;

2. Whether the doctrines of *res judicata* and/or collateral estoppel are available as defenses;

3. Whether the statute of limitations has run on the plaintiff's claim.

THE CASE LAW:

1. *Penn Central Transportation Co. v. City of New York,* 98 Sup. Ct. 2646

As pointed out in this case at page 2659, the question of "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. Quite simply, the trial court has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government. Each case rises or falls largely "upon the particular circumstances in that case." As identified in the cases, several factors have been taken into consideration:

a. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;

b. The "character" of the governmental action;

c. Where the governmental tribunal reasonably concluded that the "health, safety, morals or general welfare" would be promoted by prohibiting particular contemplated uses of land. See numerous cited cases.

Further, this case cites the case of *Goldblatt v. Hempstead,* 82 S. Ct. at page 990 for the proposition that it is implicit that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose.

Finally, the case quotes Mr. Justice Holmes, who, speaking for the court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the

constitutional way of paying for the change." Citing *Pennsylvania Coal Co. v. Mahon,* 43 Sup. Ct. @ 160.

2. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S. Ct. 2378 (1987), in which the City has heavily relied upon, the Supreme Court came to grips with the problem of remedies for a regulatory taking. The California Court of Appeals had rejected a landowner's claim for damages due to a land use regulation prohibiting any building in a flood prone area. The Court of Appeal's reasoning was based on the California Supreme Court's holding that inverse condemnation is not available to an owner suffering loss because of a zoning regulation. The only available remedies for affected Californians were mandamus or declaratory relief. If a zoning regulation is declared invalid, said the California courts, then, if the government persisted in applying the voided regulation, damages might be recoverable.

The *First English Evangelical* decision expressly examined the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief. After a detailed discussion of the theory and precedent the Supreme Court held that:

"... where the government's activities have already worked a taking of *all* use of property, no subsequent action by the government (i.e., amendment or elimination of the ordinance) can relieve it of the duty to provide compensation for the period during which the taking was effective . . . Invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy . . ."

3. *City of Clearwater v. College Properties, Inc.,* 239 So2 515

In this case, the City of Clearwater had denied applicant's request for change of zoning. The circuit court quashed the action taken by the City and enjoined it from enforcing its zoning regulations as applied to the applicant's property and ordered the City to change the zoning of applicant's property to a less

restrictive classification. The City appealed.

In this case, the City Planner stated that the zoning in place was better for "sanitary" and "aesthetic" reasons and that it would give "stability" to the neighborhood; also, that it would prevent an increase flow of traffic in the neighborhood.

The trial court found that the evidence clearly established that the zoning regulation in question as applied to applicant's property was unlawful, unreasonable and capricious; that the restrictions imposed on the property bore no relationship to the public health, safety, morals or welfare of the citizens and that the action of the City was contrary to law and amounted to confiscation of applicant's property.

In affirming the trial court, the appeals court stated that a reduction in the value of the property caused by the zoning ordinance is not, of itself, enough to render the ordinance confiscatory. The property owners must show that the application of the zoning ordinance has the effect of completely depriving them of the beneficial use of their property by precluding all uses *or the only use to which it is reasonably adopted, or that the ordinance has invaded their personal property right unnecessarily or unreasonably in violation of the Federal or Florida Constitution.* (Court's Emphasis)

4. *Askew v. Gables-By-The-Sea, Inc.* 333 So2 56

In January of 1936, plaintiff acquired by purchase, from the Trustees of the Internal Improvement Fund, a substantial tract of bay bottoms in Biscayne Bay and the City of Coral Gables. The bulkhead line had extended seaward and was reestablished some distance seaward from its previous location. In 1956, the plaintiff began to seek the necessary permits to dredge from the adjacent public bottoms and fill its land. The Trustees agreed to issue the permit in May of 1956. In 1967, plaintiff purchased and paid for the second parcel of bottoms — that lying between the old and new bulkhead lines. Prior to October, 1965, the City of Coral Gables approved a fill permit which was extended to 1968. The Trustees also approved it. In May of 1968 the Trustees, by resolution, prohibited any person from dredging unless said

operations had already commenced. When this permit denial was lifted, the U.S. Corps of Engineers, which previously had permitted the project, ruled that the permit had expired and would not be revived or extended. The court ruled that these actions were without lawful authority and void and that plaintiff had the lawful right to dredge material from the areas on the permit. The case was appealed. The Appeals Court in affirming the inverse condemnation judgment held:

"It is the conclusion of this court that the appeal herein is dilatory in nature, is sought by appellants for the sole purpose of further frustrating and delaying compliance with the mandate of this court and the final judgment of the trial court, is frivolous, and not taken in good faith."

In this case, it took the landowner 13 years of bureaucratic delays and protracted litigation to get its permit.

In finding for the owner, the court concluded that not only had the owner's permit been unlawfully revoked but that the revocation ultimately resulted in the denial to the plaintiff the use of his land for private purposes (after 13 years of litigation). Further, the court concluded that the unlawful action of the Defendants caused the valid permit to expire; that the Defendants had used every court process to delay the granting of the permit which ultimately caused the Plaintiff to be denied the use of his property. The Defendants were enjoined and the plaintiff was found to be entitled to a judgment requiring the Defendants to institute condemnation proceedings.

5. *The Hollywood Beach Hotel Co. v. The City of Hollywood,* 329 So2 10

The plaintiffs owned 105 acres in the City of Hollywood which were zoned for a golf course. In 1968 the owners decided to develop the property into a 6000 unit complete community and petitioned the City for a change of zoning. This change was adopted by the City upon passage of an ordinance to that effect. In early December of 1969, two commissioners who voted for the ordinance were defeated for re-election. On December 17, 1969, the two new commissioners joined with the commissioner

who had originally opposed the ordinance to petition the planning and zoning for a reevaluation of the project. On December 30, 1969, the owners obtained a building permit from the State for the construction of the first five million dollar building. On January 12, 1970, the Planning and Zoning Board tabled the City's motion for reevaluation. Also, on January 12, 1970, the building permit for the project was issued by the City. On February 19, 1970, the City brought a petition to rezone the property before the Planning and Zoning Board. On February 21, after nine or ten months of preparation and an expenditure of $191,000, the owners sued the City for injunctive relief. The court denied the temporary relief and denied the City's motion to dismiss. The City filed an interlocutory appeal on March 19th. In the meantime the Planning and Zoning Board denied the City's petition to rezone. The City appealed the Planning and Zoning Board's decision which was tabled for 60 days on July 15th and the City extended the building permit. On August 21, the Court of Appeals affirmed the trial Court's denial of the motion to dismiss. The City then voted to petition for rehearing and, if denied, to appeal to the Supreme Court. After rehearings and petition for certiorari were denied in January, 1971, the City filed its answer on February 1971. The City then rescinded the extension of the permit and demanded that the owners exercise their rights under the permit within 90 days. On March 17, the petitioners requested the return of their permit fee until building conditions improved. This request was denied. In the meantime, the suit for injunctive relief was actively prosecuted. In December 1971, the remaining two commissioners who had voted for the change of the ordinance were defeated. In January 1972, the Commission asked the Planning and Zoning Board to, again, reevaluate the project. Also, the Commission took the first action to lower the density on the property. This requirement had the effect of rendering the property site plan useless. Owners then sought another temporary injunction. On February 14, the Planning and Zoning Board approved a rezoning plan. At the hearing for injunctive relief, the petitioner pointed out that the delays

together with the newspaper coverage had prevented them from getting financing and that the project had been kept in limbo because of the City's actions: that the site plan had been rendered useless as was the building permit.

On March 1, 1972 the density ordinance passed and on April 17, the Planning and Zoning Board recommended that the property be rezoned. On June 28, the commission rezoned the property. On July 19, the trial court entered a permanent injunction against the City enjoining the passage of the ordinance. The District Court reversed and the Florida Supreme Court granted certiorari. The Supreme Court found that the Appeals Court had substituted its' judgment for that of the trial court and had reevaluated the evidence. It also found that the owners had taken steps which equitably estopped the City and that the owners' building permit was not forfeited. The Court noted that, *"it is undeniable that the only circumstance which necessitated the ultimate rezoning was the adverse political climate which wrought defeat of every commissioner who had voted for the rezoning; also, that the City sought to accomplish by delay that which it could not accomplish by immediate rezoning.* (Court's emphasis)

Other cases have been cited by respective counsel and will be referred to in the holding of this case.

Findings:

The court finds that there was a "taking" by inverse condemnation of plaintiff's property by the defedant City; that the doctrines of *res judicata* and/or collateral estoppel are not available as defenses by the City; that the statute of limitations did not run as the City claims.

As to the taking, Yardardm's cause is pregnant with equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building official; however, the City's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not

only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant responsiblity for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. See *Hollywood Beach Hotel case*.

The first factor taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has upon the claimant. In this case, Yardarm and its stock holders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Penn Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, simply stated, it was purely political. The Hillsboro Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsboro Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought

defeat on those commissioners who voted in favor of constructing the hotel.

Similiarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary," "aesthetic," and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the Court went on to state that if the regulatory action has invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* use of its property. To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the City Manager got involved when it was not his duty to do so; the Mayor was concerned about getting re-elected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm, in fact, was denied all use of its property. Time and time again civil actions had to be brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's purpose. Illegal acts of certain City officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would not have allowed it.

Counsel for the City have cited the case of *McNulty v. Town of Indiatlantic*, 727 F. Supp. 604, in support of their position that the property owner was not denied *all* use of his property. As in

the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

City's counsel claim that Yardarm's case is time-barred. This case is not unlike *Askew vs. Gables-By-The-Sea, Inc.* In that case, it took the landowner 13 frustrating years to finally obtain its permit. There, the illegal revocation of the permit finally caused the loss of the property. If the statute of limitations is applicable in this case (and the court isn't sure that it is) then it was tolled for the same reasons that it was tolled in *Askew*. The dilatory and bad faith actions of the City were continuous in nature and, indeed, had a domino effect which ultimately caused the loss of the property.

The City has also raised the defenses of *res judicata* and/or collateral estoppel. It cites *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So2 1295 as its authority. In that case certain statements were made by the court to the effect that the City's "obstructionist tactics" had ended in 1979. In that case, the court did not have a complete and up-to-date record. Further, the statement was *dicta* and did not pertain to the holding of the case. The court noted that the City had never been given an opportunity to determine whether the ordinance in question served the public's interest and for that reason should not be enjoined; that, also, Yardarm had not shown sufficient basis for "irreparable injury" grounded in principles of estoppel and equitable estoppel to sustain a request for permanent injunction. Since the causes of action and issues of that case are entirely different from the cause of action for inverse condemnation in this case, the principles of *res judicata* and/or equitable estoppel do not apply.

For the reasons stated, the Court finds that there was a taking of plaintiff's property (the fee) as described in the attached Appendix "B"; that the effective date of the taking was October 30, 1985; that the City of Pompano Beach is responsible for the taking and is liable for payment of full compensation under the constitutions of the United States of Florida and Florida's eminent domain law, F. S. 73 and 74; that a jury shall

be impanelled to make its findings relative to the issue of valuation; that the City of Pompano Beach shall be responsible for payment of reasonable costs and attorney's fees for the entire proceeding; that the hearing regarding reasonable attorney's fees and costs shall be heard after the conclusion of the valuation trial.

DONE AND ORDERED this 5th day of June, 1991
C. LAVON WARD, Circuit Judge

Copies furnished:
Randy Adams, Esq.
Earl Faircloth, Esq.
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Marcy S. Resnik, Esq.

Supreme Court, U.S.
FILED
MAY 2 0 1995
CLERK

Case No. 94-1795

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

YARDARM RESTAURANT, INC.,

Petitioner,

v.

CITY OF POMPANO BEACH, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent refers this Court to several matters not disclosed by Petitioner in its statement of the case, which are relevant to issues of jurisdiction and the timely and proper raising of federal questions.

Petitioner filed its lawsuit in 1987 seeking damages under the Fifth and Fourteenth Amendments for an alleged "taking" by the Respondent, as well as a claim for identical damages pursuant to 42 U.S.C. §1983. Prior to trial, Petitioner's §1983 claims were dismissed through the entry of summary judgment. Petitioner tried its inverse condemnation claim strictly on a "permanent taking" basis, arguing that its entire bundle of property rights had been lost in 1985 allegedly due to acts or omissions of Respondent. The trial court's order (Petitioner's Appendix, A-23) reflects that Petitioner exclusively pursued a "permanent" taking claim. Petitioner did not argue that a "temporary" taking had occurred, primarily because Petitioner's witnesses at trial admitted that its property could have been put to a myriad of economically viable uses other than the 18-story hotel project proposed for the two-parcel site (including, for example, a ten-story hotel). Petitioner in fact voluntarily demolished its lucrative "Yardarm" restaurant on the site in 1977.

The Florida appellate court decision, which Petitioner asks this Court to review, similarly reflects Petitioner's exclusive "permanent taking" theory of recovery. Petitioner has not prosecuted this matter as a "temporary" taking case. As a result, Petitioner did not timely or properly raise in the

courts below its current assertion that conflict exists between principles governing permanent and temporary takings.

Petitioner also fails to alert this Court to the Florida appellate court's handling of Petitioner's §1983 claim which was previously dismissed by the trial court through summary judgment. Because this was an appeal from a non-final order, the Florida appellate court felt constrained to remand this case to the trial court for further proceedings, i.e. to provide Petitioner an opportunity to obtain reconsideration of the summary disposition of its §1983 claim. City of Pompano Beach v. Yardarm Restaurant, Inc., 641 So.2d 1337, 1338-1389 (Fla.4th DCA 1994). The lack of finality in the proceedings below, and in particular the prospect of additional rulings on federal questions, are matters important to this Court's determination of jurisdiction and the propriety of discretionary review.

SUMMARY OF ARGUMENTS

The Petition should be denied because this case does not present a sufficiently concrete factual setting to support a decision of constitutional magnitude by this Court. The evidence considered by the Florida appellate court below, demonstrated that Petitioner was free to put its property to a multitude of permissible uses, and that Petitioner's dispute with Respondent exclusively involved Petitioner's efforts to develop an 18-story hotel on its two-parcel site. Petitioner was always free to erect a 10-story hotel on its property. Further, Petitioner voluntarily demolished its lucrative restaurant operation on its property, a decision which

adversely affected Petitioner's ability to proceed with its 18-story hotel project later. Simply put, this case does not present this Court with a true "taking" claim. Petitioner inappropriately asks this Court to issue an advisory opinion based on hypothetical facts and legal settings, rather than the claims pursued and evidence introduced below.

Petitioner's attempt to create conflict among this Court's "taking" decisions is unpersuasive, and does not support the granting of the Petition. The opinions of this Court cited by Petitioner do not conflict, but represent a progression and continuing clarification of principles governing "taking" claims. Although the Petitioner suggests conflict between opinions involving temporary and permanent claims, Petitioner exclusively pursued a permanent taking claim below. The "interplay" between temporary and permanent taking doctrines was not presented to the trial court, or the Florida appellate court, simply because Petitioner never pursued the argument that a temporary taking had occurred. The Petitioner has injected the notion of temporary takings, for the first time in its Petition, in an obvious attempt to create conflict and confusion where none exist and even though these points were not preserved below. Also for the first time in its Petition, the Petitioner asserts that the alleged permanent taking by Respondent occurred in 1989, although at the trial and appellate court levels, the Petitioner asserted that the "taking" had occurred on October 30, 1985 when, by operation of law, the time expired for Petitioner to reinstate its building permit on one of its two parcels of land. At that time, Petitioner had not even applied for a building permit for its other parcel.

Again, the Petitioner injects matters not previously raised below, this time to suggest that its taking claims did not ripen until 1989. This newly crafted contention serves no useful purpose to Petitioner, however, in view of the fact that Petitioner's complaint was filed two years earlier, at a time when Petitioner obviously believed all elements of its purported taking claim existed in fact. The Petition does not present any logical argument, based on the evidence introduced below, which demonstrates why discretionary review should be granted.

Finally, the Petition seeks this Court's discretionary review of a Florida appellate court opinion which lacks the element of "finality" required under 28 U.S.C. §1257. Respondent questions this Court's jurisdiction to grant the Petition.

I.

THIS CASE DOES NOT PRESENT ANY CONFLICT, OR A SUFFICIENTLY CONCRETE FACTUAL SETTING WHICH WOULD MAKE A DECISION BY THIS COURT NECESSARY

The Petitioner suggests to this Court that a state of confusion and conflict exists among announced principles governing inverse condemnation claims. The Petition is replete with contentions that this Court's pronouncements in recent "taking" decisions have placed these standards in a state of total disarray, leaving litigants and lower courts to fend for themselves in a sea of ambiguity.

Respondent urges, however, that Petitioner's claimed confusion is self-inflicted, and that, in fact, Petitioner through its arguments has sought to create confusion and conflict where none exists, as a device to persuade this Court that certiorari should be granted. This method was employed unsuccessfully by Petitioner when seeking discretionary review by the Florida Supreme Court. Respondent's Appendix, 1a. This Court should not grant the Petition because there exists no need to revisit "taking" issues explored in recent decisions and, in any event, the factual setting presented in this particular case does not provide the Court with an appropriate basis on which to address any perceived need for clarification in the law.

The evidence introduced at trial below, as well as the orders issued by the trial and appellate courts, establish clearly that Petitioner's inverse condemnation claim against Respondent was based solely on a permanent taking theory; Petitioner's complaint loosely alleged an entitlement to full compensation for the loss of use of its property "since 1974 to the present time" and "to full compensation for the total loss of the property itself", (see Respondent's Appendix, 12a ¶7); similarly, the Petitioner in Count II of its complaint sought damages under 42 U.S.C. §1983 "for the total loss of its property by mortgage foreclosure and final taking of its property". (Respondent's Appendix, 12a (Count II, habendum clause).

At trial, Petitioner clearly jettisoned any temporary taking claims, and instead exclusively sought damages for the alleged "final taking" of its property, based on the fact that Petitioner's right to reinstate its building permit (applicable to only one portion of its property) had expired on October 30, 1985. City of Pompano Beach, 641 So.2d at 1382. Petitioner at trial specifically identified October 30,

1985 as the date on which the alleged permanent taking occurred, notwithstanding that Respondent took no action on that date and Petitioner admittedly remained free to put its property to a multitude of permissible uses.

Petitioner did not prosecute this action as a temporary taking claim. The trial court's order determined that a "permanent taking" occurred on October 30, 1985; no finding was made by the trial court that any "temporary taking" had occurred.

At the Florida appellate court level, Petitioner again pursued arguments solely on a "permanent" taking basis, asserting that the Respondent's alleged acts or omissions led to the total loss of its property through foreclosure. City of Pompano Beach, 641 So.2d at 1382, 1384. Petitioner did not appeal the trial court's order and therefore acquiesced to the absence of any finding of a temporary taking.

The Petition likewise demonstrates that Petitioner exclusively pursues a claim for compensation based on an alleged"permanent taking". Petition, at p.16.

A recognition of the permanent nature of the taking asserted by Petitioner reveals the subterfuge which the Petitioner now attempts to utilize to create conflict or confusion among the Court's prior declarations. The Petition suggests the existence of "reigning national confusion on the interplay of temporary v. permanent takings" as grounds for this Court's grant of certiorari. While Respondent contests the idea that such alleged confusion exists, as a threshold matter this case does not present the Court with an appropriate setting in which to reach such issues. Any alleged interplay of the law governing temporary versus permanent takings simply is not

presented by this case, as Petitioner from the trial level through its Petition has only pursued a "permanent taking" claim against the Respondent, thus making any alleged interplay with temporary takings law irrelevant, and any discussion of that interplay unnecessary.

This Court has consistently held that "[g]iven the essentially ad hoc, factual inquiry involved in the takings analysis, ... we have found it particularly important in takings cases to adhere to our admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Pennell v. City of San Jose, 485 U.S. 1, 10, 108 S.Ct. 849, 856 (1988), citing Kaiser Aetna v. United States, 44 U.S. 164, 175, 100 S.Ct. 383, 390 (1979). The Petition inappropriately presents this Court with a hypothetical setting in which to address "temporary" taking issues. The Petition improperly poses to this Court abstract questions of law on which merely advisory opinions are sought. This Court is without power to give advisory opinions, and the established practice of this Court is to refrain from deciding abstract, hypothetical or contingent questions or to decide any constitutional question unless compelled to do so by an actual case or controversy presented. See Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389 (1945). Petitioner employed this tactic of "creating" conflict when it sought discretionary review by the Florida Supreme Court, to no avail. Respondent's Appendix, 1a; Petitioner's Appendix, A-1. The Petition fails to present a justiciable case to this Court for resolution.

Petitioner suggests that the Florida appellate court "ignored" the Fifth Amendment because the Respondent's conduct was allegedly "so bad". Petition, at p.13. No more meaningful comment is offered by Petitioner regarding

alleged error by the court below. In any event, the extent of analysis disclosed by the appellate court in its opinion below dispels that notion.

The Petition merely provides an abstract discussion of recent decisions by this Court which have discussed both temporary and permanent taking claims, arising from both physical invasions, or regulatory actions, by governmental agencies. The Petition fails to tie this analysis into any discussion demonstrating that the Florida appellate court, in reversing the trial court's determination of a permanent taking, contravened any established principles of federal takings law.

A review of the Florida appellate court's opinion (Petitioner's Appendix, A-2) does not reveal a casting aside of established takings principles, but instead a deliberate, insightful and broad examination of opinions of this Court governing "takings" claims and a particularized analysis and application of the unique facts presented in this case. In a nutshell, while the Petition may equate with an abstract law review article providing commentary on the recent decisions of this Court regarding takings, the Petition entirely fails to demonstrate the need or propriety of granting certiorari to address any of the findings of fact or conclusions of law enunciated by the Florida appellate court below.

The appellate court opinion sought to be reviewed demonstrates further that this case presents such unique facts, including those reflecting acts or omissions of the Petitioner itself which led to its ultimate loss of its property, that this Court's issuance of an opinion on the merits of this case would be of little precedential value. In fact, issuing an opinion on the merits of this case would undoubtedly lead to the confusion which Petitioner claims now exists.

The record reflects several crucial facts and circumstances which would render the grant of certiorari unwarranted. For instance, during its on-going dispute with Respondent over permitting issues, the Petitioner voluntarily razed its tremendously lucrative and popular restaurant operation in April, 1977. Petition, at p.3; Petitioner's Appendix, A-4. This fact is extremely significant when considering Petitioner's current claims that there existed no economically viable use of its property other than its proposed 18-story hotel, and that actions or omissions of the Respondent solely caused its financial difficulties and ultimately loss of its property through foreclosure.

In July 1981, Petitioner ultimately received the building permit which it sought, for the eastern portion of its property (the "East Parcel"); this permit remained in effect without interruption until it expired by operation of law on October 30, 1985. In 1981, the Petitioner had purchased a separate parcel (partially encumbered by a long-term lease) across State Road A-1-A (the "West Parcel") ostensibly to attract outside investors to its 18-story hotel project.[1] Although Petitioner obtained plat approval for the West Parcel in 1982, Petitioner never submitted an application for a building permit for the West Parcel prior to the initiation of foreclosure proceedings against the property. City of Pompano Beach, 641 So.2d at 1381.

The Florida appellate court aptly noted that the trial court's final judgment of a "permanent taking" was

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[1] A map of the Yardarm properties (East and West Parcels), and a color-based description of permissible uses for each parcel, was introduced into evidence at trial and is reprinted in Respondent's Appendix, 24a.

erroneous because, at the time final judgment was entered, Petitioner did not own the real property which the Respondent allegedly had "taken". The evidence reflected that the property had been lost through foreclosure to Petitioner's lender, to which Petitioner had granted a mortgage encumbering the East Parcel to permit Petitioner to purchase the West Parcel. Petitioner's Appendix, A-10, A-13.

Briefly summarized, from July 1981 until October 30, 1985, Petitioner held a permit to build on its East Parcel; the lower appellate court recognized that Respondent took no action to interrupt or interfere with Petitioner's ability to build on the East Parcel during this time. Petitioner never applied for a building permit regarding its West Parcel prior to the initiation of foreclosure proceedings by its lender.

The evidence introduced at the trial court below further reflected, and the Florida appellate court noted, that although a myriad of permissible uses applied to the Petitioner's property under Respondent's zoning regulations, Petitioner did not seek approval of alternative uses throughout the entire period since its voluntary destruction of its lucrative restaurant operation on the property. Petitioner's Appendix, A-16 and A-17. Ironically, "hotels" were one of the many uses permitted on Petitioner's properties (see Respondent's Appendix, 24a); the essential dispute between Petitioner and Respondent concerned the height of the hotel proposed by Petitioner.

Regarding the value of its land, the Petitioner at trial was unable to establish any negative impact as a result of any acts of Respondent; in fact, the evidence elicited at trial disclosed that notwithstanding any allegedly obstructive

actions of Respondent which had ceased no later than 1979,[2] Petitioner's property admittedly increased in value from $5 million in 1981 to at least $6.2 million in 1985, and that Petitioner had rejected an offer in 1983 to sell the property for $8 million because Petitioner thought the offer was too low. Petitioner's Appendix, A-19.

These facts not only were central to the Florida appellate court's reversal of the trial court's decision, but are also indicative of the circumstances presented in this case which would render the granting of certiorari ill-advised.

II.

ASSUMING PETITIONER HELD A TAKING CLAIM, PETITIONER FAILED TO ASSERT THAT CLAIM TIMELY; PETITIONER'S RIPENESS ARGUMENTS ARE DISPELLED BY THE PARTICULAR FACTS IN THIS CASE.

Once again, a simple but careful review of the factual unpinnings of Petitioner's claim demonstrates its lack of merit, and consequently reveals the grounds for denying the Petition. The Petitioner provides an abstract review of recent decisions of this Court concerning issues of ripeness and finality, but has failed to demonstrate through factual application that those decisions demonstrate the need for this Court's intervention in this case. Petitioner cites United States v. Dickinson, 331 U.S. 745 (1947), for the established

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[2] See City of Pompano Beach v. Yardarm Restaurant, Inc., 509 So.2d 1295, 1297 ("the complained-of activities took place in 1979 and before").

proposition that piecemeal or premature litigation is to be avoided, and that the acts of government complained of should reach some finality before a takings claim is determined to have ripened. Accord, Pennell v. City of San Jose, 485 U.S. 1 (1988). In the case at bar, the Florida appellate court, in two separate instances of appellate review, determined that all allegedly obstructive acts of the Respondent ceased in 1979, and that Petitioner's building permit for its East Parcel was re-issued in 1981. Petitioner's Appendix, A-22; City of Pompano Beach v. Yardarm Restaurant, Inc., 509 So.2d 1295, 1297 (Fla. 4th DCA 1987).

Petitioner boldly suggests (for the first time) that Respondent's 1989 purchase of the subject property from FDIC (as successor to Petitioner's mortgagee which had obtained title through foreclosure in 1986), see Petitioner's Appendix A-29, is the physical invasion which finally ripened Petitioner's alleged taking claim against Respondent; this argument is pursued by Petitioner notwithstanding that all of Petitioner's interests in its property were lost through the 1986 foreclosure sale, and that any allegedly obstructionist activities of the Respondent ceased no later than 1979. City of Pompano Beach, 509 So.2d at 1297. Indeed, at trial and through intermediate appeal, Petitioner had specifically asserted that its taking claim ripened on October 30, 1985 when by operation of law its right to reinstate its East Parcel building permit lapsed. The trial court adopted Petitioner's position that a total taking occurred as of October 30, 1985. See Petitioner's Appendix, A-10 and A-38; City of Pompano Beach, 641 So.2d at 1381-1382. Petitioner for the first time now asserts an event in 1989 as the point at which its permanent taking claim ripened and from which the statute of limitations on its taking claim began to run. The fact that Petitioner's

complaint was filed in October 1987 (two years prior to the "ripening" event now claimed) reveals the lack of merit to this new theory of ripeness.[3]

Petitioner under the guise of its ripeness discussion attempts to create conflict and confusion between permanent taking cases, and this Court's seminal opinion in First English regarding temporary takings. Petitioner's alarmist queries as to whether First English "abolished" permanent regulatory takings or whether different standards exist between permanent and temporary regulatory takings, add nothing to Petitioner's request for discretionary review of this case; they are merely abstract contentions which expose the Petition's lack of merit. Once again, no conflict or confusion truly exists among those principles; no conflict exists in the case at bar, as Petitioner has consistently pursued a claim asserting a permanent taking only. To the extent any acts of the Respondent amounted to any taking of property from Petitioner, such claims had clearly ripened and would have been justiciable as of July 1979 when all allegedly wrongful acts of the Respondent ceased with regard to Petitioner's then-existing request for a building permit on its East Parcel. There could be no question that any taking claims (temporary or permanent) ripened at that point, and that such claims are now barred. Furthermore, because Petitioner admitted at trial that no temporary takings occurred, and because Petitioner prevailed at trial on a permanent taking basis, any discussions bearing on temporary taking issues are irrelevant.

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[3] The complaint was never amended or supplemented by Petitioner to reflect the 1989 event which is now asserted as the basis of its taking claim!

III.

PETITIONER ARGUABLY HELD A CLAIM BASED ON A DENIAL OF DUE PROCESS, NOT A REGULATORY TAKING, BUT THAT CLAIM IS NOW TIME-BARRED

Based on findings made by the trial court that certain actions of the Respondent were "illegal", "arbitrary and capricious" or "dilatory", Petitioner raises in this Court the question of whether a Fifth Amendment taking claim may be based solely on such findings and notwithstanding the absence of a deprivation of substantially all economic, beneficial or productive uses of the property. The Petitioner cites this Court's decision in Nollan, 483 U.S. 825 (1987), and Dolan, ____U.S.____, 114 S.Ct. 2309 (1994), in an attempt to establish either conflict or a need for clarification on this issue.

Both Petitioner and the trial court confused the elements of a regulatory taking claim with those arguably supporting a due process claim for damages. Petitioner erroneously suggests that no remedy exists for those who are subjected to "arbitrary and capricious" actions of governmental officials, in the absence of a substantial deprivation of use. The Florida appellate court noted otherwise based on established federal decisions under 42 U.S.C. §1983. Both Nollan and Dolan questioned the degree of interference brought about by government regulation; the legitimacy of the government's regulatory interests was not the prime focus of those decisions. Because the legal and factual underpinnings of Nollan and Dolan are dissimilar from the case at bar, this additional request to clarify the law on "takings" is without merit.

This Court in Nollan provided guidance in determining whether a regulation, which is imposed pursuant to a legitimate state interest, nevertheless has "gone too far" in its adverse impact upon private property rights so as to require just compensation under the Fifth Amendment. Nollan introduced the "rough proportionality" test, requiring courts to determine whether an essential nexus exists between the legitimate state interest involved, and the regulatory action imposed; if the nexus exists, the question then becomes one of degree between the regulatory actions and the goal to be accomplished by those regulatory measures. In Nollan, this Court determined that the regulation at issue did not meet even the loosest standard of reasonable impact. In Dolan, finding that a legitimate state interest existed, this Court further discussed the question of the degree of connection between the regulatory measure employed by the governmental agency, and the projected impact on the proposed development.

In both Nollan and Dolan, the legitimacy of the state interest pursued by the governmental entity, did not play a role in this Court's decisions whether or not to uphold the regulatory measures as implemented. In other words, neither of these decisions relate to the narrow issue raised by Petitioner.

Furthermore, the Florida appellate court in this case has already addressed the issue of whether any remedy existed to Petitioner outside of Fifth Amendment protections. Citing the very trial court determinations now raised by the Petitioner, the Fourth District Court of Appeal noted that "[a]lthough speaking in terms of a "taking", the fact findings of the lower court are a classic expression of a denial of due process. The lower court correctly perceived that the law provides a remedy for such conduct, but, unless there is a

deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy. If an invalid exercise of police power causes damage not amounting to a "taking", the claim is for a violation of substantive due process and the remedy is monetary damages." City of Pompano Beach, 641 So.2d at 1385 (emphasis original) (citing Corn v. City of Lauderdale Lakes, 997 F.2d 1368, 1374 (11th Cir. 1993), cert. denied, _____U.S.____, 114 S.Ct. 1400 (1994); Eide v. Sarasota County, 908 F.2d 716, 720-722 (11th Cir. 1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073 (1991)).

Indeed, the Florida appellate court referred to the Third Circuit Court of Appeal's decision in Bello v. Walker, 840 F.2d 1124 (3rd Cir.) cert. denied, 488 U.S. 868, 109 S.Ct. 176 (1988), as an example of circumstances under which a §1983 claim may lie but where a "taking" claim could not be properly asserted. As in the case at bar, the claimant in Bello had merely been denied a particular building permit but retained the right to put its land to multiple alternative uses. City of Pompano Beach, 641 So.2d at 1385 (citing Bello, 840 F.2d at 1128-29, 1131).

Although the Florida appellate court below cast serious doubt as to the viability of any §1983 claim previously asserted by Petitioner below, the Florida appellate court expressly remanded this case to the trial court to provide Petitioner an opportunity to raise the federal question of whether its alleged §1983 claim was also time-barred at the time Petitioner filed suit. However, it is clear from a review of the decisions cited by Petitioner and other relevant opinions referenced by the Florida appellate court below, that the trial court's findings regarding any alleged acts of the Respondent did not invoke Fifth Amendment protections.

IV.

THIS COURT LACKS JURISDICTION OVER THIS CASE, AS THIS MATTER LACKS THE "FINALITY" REQUIRED UNDER 28 U.S.C. §1257(a)

Respondent urges the Court to dismiss the Petition for want of jurisdiction. Petitioner has sought to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). The opinion of the District Court of Appeal, Fourth District of Florida, which is the subject of the Petition, lacks the element of "finality" required by 28 U.S.C. §1257(a) and this Court's decisions interpreting that statutory grant of jurisdiction.

This Court's lack of jurisdiction over this matter is made clear by its prior decision in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), an opinion in fact cited in the Petition. In San Diego Gas, the appellant in pending inverse condemnation litigation sought review of the California Court of Appeal's decision that an owner deprived of beneficial use of his land by a zoning regulation was not entitled to damages for inverse condemnation, but may have been entitled to declaratory relief or a writ of mandamus. Because factual disputes remained regarding appellant's entitlement to mandamus or declaratory relief at the trial level, the California Court of Appeal remanded the case for further proceedings. The appellant in San Diego Gas suggested to this Court that its Fifth and Fourteenth Amendment rights had been violated by the refusal of the California courts to award compensation.

This Court ultimately dismissed that appeal, finding that it was without jurisdiction to hear the matter in the absence of a final judgment issued by the California state

courts. San Diego Gas, at p. 633. This Court noted its disdain toward piecemeal litigation, particularly in the "taking" arena. Ibid.

This Court's want of jurisdiction in the case at bar is made clear by the Florida appellate court's decision to remand this case for further proceedings to address the trial court's prior summary disposition of Petitioner's due process claims under 42 U.S.C. §1983. City of Pompano Beach, 641 So.2d at 1388-89; Respondent's Appendix, 12a (Complaint, Count II). Accordingly, "[i]n such a case, the remaining litigation may raise other federal questions that may later come here." San Diego Gas, at 633.

It is abundantly clear from the record below that the opinion appealed from by Petitioner lacks the essential element of "finality" required to confer jurisdiction under 28 U.S.C. §1257(a). The state appellate court through its opinion requests the trial court upon remand not merely to perform ministerial acts, but also to provide Petitioner the opportunity to obtain reconsideration of the trial court's prior summary disposition of the §1983 claim in light of the appellate court's opinion, City of Pompano Beach, 641 So.2d at 1388-89, in an attempt to reach a truly final decision on the merits of Petitioner's claims. For this reason, this Court lacks jurisdiction, and the Petition must be denied.

CONCLUSION

Respondent respectfully urges this Court to deny the Petition for a writ of certiorari.

Respectfully submitted,

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May 26, 1995

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,543

YARDARM RESTAURANT, INC.

Petitioner,

vs.

CITY OF POMPANO BEACH

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA
(FIFTH DISTRICT SITTING BY DESIGNATION)

PETITIONER'S BRIEF ON JURISDICTION

[Listing of Attorneys, Table of Contents, and Table of Citations omitted in printing.]

STATEMENT OF THE CASE AND THE FACTS

In 1959, the Stephanis brothers opened the Yardarm Restaurant on land overlooking the Hillsboro Inlet and a lighthouse. The restaurant was one of Florida's 10 best and busiest. In 1972, Yardarm decided to turn the property into a European style grand hotel. Finding no

legal restrictions whatsoever blocking this project, Yardarm's preliminary hotel plans were approved.

Although Yardarm had the clear legal right to build its hotel a few politically influential citizens complained, fearing that the project would block their view of the lighthouse. Bowing to political pressure, public officials vowed the project would never be built. Thus began what the appellate court opinion labels as the "sorry saga" of the Yardarm.

Yardarm received its first building permit on February 14, 1974. Four days later the permit was illegally revoked. Three years later, in 1977, after two circuit court decisions and one appellate decision the City was ordered to reissue the permit under the same terms and conditions as existed in 1974.

Upon reissuance of its permit Yardarm demolished its restaurant and began construction in earnest. However, unlike 1974, the reissued permit did not include the docks and quays which were an integral part of both the physical and financial structure of the project. The City refused to issue the dock permit and Yardarm was forced back to court. After another year and another trial the City *agreed* to an order allowing the docks to be built. This order required the City to provide any written assurances required by the Corps of Engineers. Instead, the City wrote the Corps of Engineers demanding that the dock permit be *denied*. While this issue was being fought, the City again revoked the building permit claiming insufficient work was being done. The parties went back to court and the City manager commanded no work be done on the property until an appeal to the fourth District or any subsequent appeal to the Supreme Court was decided.

Once again Yardarm won all the court battles and on July 16, 1981, three years after the second unlawful revocation, the permit was reissued for a third time. Due

to unprecedented inflation and increases in building costs during 1978-1981 the cost of the project quadrupled forcing Yardarm to reorganize the project and seek outside financing.

From 1981-1985 Yardarm's plan was to do as much work as possible to keep its permit alive while seeking permanent financing. (The trial court specifically found that Yardarm's inability to secure permanent financing during this period was a direct result of the City's hostilities). Nevertheless, on May 1, 1985, the City again deemed work progress insufficient and, once again, revoked the building permit. The letter of revocation gave Yardarm until October 30, 1985 (180 days) to refile its plans. Yardarm refiled it [sic] plans on time but the City ignored them, and tried to change the existing zoning for the project. Finally defeated, Yardarm suffered a foreclosure and bankruptcy.

On September 15, 1987 Yardarm Restaurant, Inc. sued Pompano alleging, *inter alia*, inverse condemnation. A bifurcated trial on the inverse condemnation claim (liability only) lasted 11 days and produced a transcript of 2,567 pages and a record of 3,859 pages. The trial court wrote a 21 page opinion (App.A) condemning the City's actions and finding a permanent taking. The date of taking was held to be October 30, 1985, the date the City's third permit revocation became final.

The City appealed to the Fourth District Court of Appeals. Eighteen months after briefing and oral argument were completed this Court reassigned the case to the Fifth District, which requested supplemental briefs and further oral arguments. On September 9, 1994, nearly three years after the trial court opinion, the Fifth District reversed the trial court holding that due to an alleged change in the law during the pendency of the appeal there was no "taking," and that the statute of limitations had run. (App.B) There are conspicuous differences between the facts recounted by the District

Court and those found in the opinion written by the trial judge. Nevertheless, even the appellate opinion does not dispute the following facts.

Pompano has never attempted to justify its interference as promoting the health, safety or welfare of its citizens. As a result of this interference Yardarm endured zoning battles, new density restrictions, new setback requirements, building moratoriums, five reviews by the City's building department, three trips to the Broward County Board of Rules and Appeals, a hearing before the Corps of Engineers, three permit revocations, seven Circuit Court cases and four trips to the Fourth District Court of Appeals. In reliance on its court ordered rights, Yardarm tore down its restaurant and spent millions of dollars to build the project. As the appellate opinion notes:

> Here, the lower court determined that the City's actions were "illegal" "arbitrary and capricious," "not taken to promote the public's health, safety or welfare," "frivolous," "dilatory," and a "usurpation of authority."

(App.B at 14).

The record below contains substantial competent evidence as to why the hotel project was the "only economically viable" use of the property. (See e.g. App. C) Pompano never introduced any evidence that any other use of the property would be "economically viable." However, the District court apparently agreed with Pompano's argument that the property could be used as a restaurant site or a site to build a 10 story building simply because the zoning laws allow such alternative uses. At no time does the court ever address the substantial evidence that, under the circumstances, no other project was "economically viable." See e.g. App. B. at 16.

Finally, the District Court also found no taking based on Yardarm's estimate that its property rose in value

from $5 million in 1981 to $6.2 million in 1985, and its alleged rejection of an $8 million offer for the property in 1983. *Id.* at 19. Assuming this is true, the opinion below fails to explain why this highly sought after property attracted only 1 bidder at auction just 3 years later. The sole bidder, the City of Pompano, managed to purchase this $8 million property for only $3.75 million.

SUMMARY OF ARGUMENT

Jurisdiction is mandated, because the decision below conflicts with the decisions of other districts and this Court on the following points of law and expressly construes Article X, Section 6, of the Florida Constitution. Specifically, conflict is created by the decision's failure to apply: the *Graham* factors; the extent of the governmental interference; deprivation of "economically viable use;" and, the substantial competent evidence developed in the record below, to its analysis of whether a permanent taking occurred. Further, the decision finds that the statute of limitations expired before the inverse condemnation action became ripe. Finally, by precedent of this Court the decision expressly construes the Florida Constitution.

ARGUMENT

I.) CONFLICT FROM REVERSAL OF PERMANENT TAKING

The panel opinion notes the trial court's finding that "Yardarm in fact was denied all use of its property," (App.B at 12) but somehow reversed the finding of a permanent taking by concluding that there was no "deprivation of substantially all economic, beneficial or productive use of the property," App.B at 14. The panel could not reverse this finding without inappropriately reweighing the evidence and disturbing the presumed correctness of the lower court's determination which was supported by substantial competent evidence.

Department of Agriculture v. Polk, 568 So.2d 35 (Fla. 1990).

The test used above by the District Court is not exclusive.[1] The failure to apply other tests directly and expressly conflicts with *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994) (" '[T]he appropriate inquiry is directed to the extent of interference or deprivation of economic use'.") (citing *Joint Ventures, Inc. v. DOT*, 563 So.2d 622 (Fla. 1990)[2]; *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981), which has been neither overruled nor questioned [3]; *Vatalaro v. DER*, 601 So.2d 1223, 1229 (Fla. 5th DCA 1992) ("[W]here the owner is left with no viable economic use of the land, a taking has occurred."); *DOT v. Weisenfeld*, 617 So.2d 1071, 1073 (Fla. 5th DCA 1993) ("Our inquiry, then must be directed to the *extent* of the interference or deprivation of Weisenfeld's economic use of his property."); *Tinnerman v. Palm Beach County*, 19 Fla. L.Weekly D1826, 1827 (Fla. 4th DCA August 31, 1994) ("A taking occurs when the property owner is deprived of all economically viable use of the land.")[4]

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[1] If anything, this test appears to apply to temporary instead of permanent takings. The test for temporary takings should be more stringent since an owner keeps his land and gets damages.

[2] As per *A.G.W.S.*, Yardarm successfully challenged the illegitimate governmental acts. But, that was not enough. The evidence at trial showed that Pompano nevertheless proceeded on a course of interference that went "too far" and amounted to a permanent taking. Yet, on appeal it was held that Florida has no legal remedy at all.

[3] *Alexander v. Town of Jupiter*, 640 So.2d 79, (Fla. 4th DCA 1994) ("The extent of appellant's reasonable investment-backed expectation is one of the factors to be considered by the court in conducting a takings analysis, *see Graham* . . . ").

[4] Although the decision being appealed is from the 4th DCA, it was assigned to the 5th DCA to sit by designation. To the extent that conflict with the 4th DCA qualifies as an interdistrict one, citation to relevant 4th DCA cases as a source of conflict is made.

The panel below mentions the "economic viability" test without applying it. The decision ignored the substantial, competent evidence establishing the hotel project as the only "economically viable" use of the Yardarm property in that no other zoned use would allow Yardarm to recoup their investment, let alone *Graham* style investment backed expectations.

The finding of no permanent taking based on the land itself retaining value conflicts with the *Vatalaro* holding:

> It cannot be concluded that a permit denial has not resulted in a taking merely on the basis that the property continues to exist in the state in which it was acquired. Certainly the land is physically unchanged by a permit denial, yet the bundle of rights the owner had has been diminished. The owner no longer has the right to own and enjoy the property as he intended *** [where] the land is purchased with future development legitimately anticipated and with no existing bar thereto.

601 So.2d at 1228-29 (footnote omitted). The test is not whether the land retains value but whether "economically viable" use is deprived under the factual circumstances. If this "land retaining value" analysis is now relevant, remand to the trial court for fact finding is warranted.

II.) STATUTE OF LIMITATIONS CONFLICT

Instead of holding that Yardarm's inverse condemnation claim began to run on October 30, 1985 (when its permit revocation became *final*), the District Court started the limitations clock on July 16, 1981 (when its permit was reissued for the second time). Thus, it found the limitations period ran in July of 1985, 3 months before the final permit revocation.

Such decision expressly and directly conflicts with *Key Haven Associated Enterprises, Inc. v. Board of Trustees*

of Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982); *Albrecht v. State*, 444 So.2d 8, 12-13 (Fla. 1984) ("The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists."); *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla. 1st DCA 1990) ("A taking could not have occurred in 1972, because appellees . . . did not have the right to bring an action for inverse condemnation until 1983, when the Corps did finally deny their permit."); *Glisson v. Alachua County*, 558 So.2d 1030, 1035-36 (Fla. 1st DCA 1990) ("['A]n essential prerequisite to a taking claim is a final decision by the government as to what use of the property will be allowed.' "); *Sarasota County v. Ex*, 19 Fla.L.Weekly D1687 (Fla. 2d DCA August 3, 1994) (suggesting a 7 year statute of limitations for inverse condemnation claims when land not deeded to government by landowner); *Vatalaro*, 601 So.2d at 1229 ("We hold that no taking occurred until DER denied Vatalaro's permit application . . . "); *Tinnerman*, 19 Fla.L. Weekly at D1826-27 ("A [takings] claim is not ripe until the government . . . has made a final decision regarding the application of the regulation to the property ***[R]ipeness requirement of a 'final decision' enables a Court to determine whether a taking has occurred and, if so, its extent.") Certainly, if the takings claim lacks ripeness, then the statute of limitations cannot have run. Yet the lower court somehow said it was so.

The decision below rationalizes its failure to apply *Key Haven* and *Albrecht* by stating, "Ripeness does not require Yardarm to engage in years of litigation with the City." App.B at 19. True, *Key Haven*, *Albrecht* and its progeny do not *require* such a challenge. But, they *allow* the challenge and toll the ripeness of a *permanent* taking claim until a *final* determination is made regarding the status of the property at issue.

The panel decision blames Yardarm for not bringing a temporary taking claim. App. B at 20. Left unsaid is that

Yardarm had no choice but to keep challenging the City's unwarranted permit revocations until a permanent taking accrued. Temporary takings damages did not surface until 1987. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (U.S. 1987), was decided two years *after* the decision below already time barred this action for permanent taking. Moreover, even if temporary taking damages had been available, the litigants, not the Courts, elect their remedies. However, the decision below suggests that forgoing relief for a *temporary* taking precludes a *permanent* taking.

Thus, the panel decision requires a developer to sue the government immediately whenever it is even arguably wrong. As such an owner must sue prior to determining whether or not damage has been caused in direct conflict with *A.G.W.S*, 640 So.2d at 54 (no compensation for taking absent showing of actual damage to owner). Essentially, the opinion below finds Yardarm stupidly continued to fight the City's illegal activities when it should have known it was beaten, dropped everything and sued for damages. Thus, if this opinion stands, a property owner not only can, but *must*, sue a governmental entity without even trying to mitigate the damages caused by its interference.

III. THE DECISION BELOW EXPRESSLY CONSTRUED ARTICLE X, SECTION 6 OF THE FLORIDA CONSTITUTION.

In *Key Haven*, 427 So.2d at 154-55, this Court reviewed a district court's decision that a judicial action for inverse condemnation, based on DER's denial of a dredge-and-fill permit, cannot be brought until all remedies under Fla. Stat. Chapter 120 have been exhausted. This Court held that this type of decision expressly construes Article X, Section 6, of the Florida Constitution thereby conferring jurisdiction in this Court.

The finding below that Florida law does not provide a remedy for the City's illegal conduct and that a landowner must bring a condemnation action before it is ripe likewise expressly construes Article X, Section 6, of the Florida Constitution and, thus, requires review by this Court under the *Key Haven* rationale.

CONCLUSION

For the reasons stated, we respectfully request that this Court take jurisdiction of this matter.

Respectfully submitted,

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By: /s/ Gale Ciceric Payne
Gale Ciceric Payne

By: /s/ James C. Pilkey
James C. Pilkey

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was hand-delivered to Henry Latimer, Esquire, Counsel for Respondent, at his office located at ECKERT, SEAMANS, CHERIN & MELLOTT, 100 N.E. Third Avenue, Suite 900, Fort Lauderdale, Florida 33301, this 20th day of October, 1994.

/s/ Gale Ciceric Payne
Of Counsel

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 87-25021

YARDARM RESTAURANT, INC., a Florida Corporation, JAMES T. STEPHANIS and THOMAS J. STEPHANIS, individually,

Plaintiff,

vs.

CITY OF POMPANO BEACH, a Florida municipal corporation,

Defendant.

COMPLAINT

[A TRUE COPY, ROBERT E. LOCKWOOD (stamp)]

YARDARM RESTAURANT, INC., a Florida corporation, JAMES T. STEPHANIS and THOMAS J. STEPHANIS, through undersigned counsel, bring this suit to recover just compensation for the taking its real property and damages for depriving it of rights secured by the Constitution and laws of the United States against the Defendant, CITY OF POMPANO BEACH, a Florida municipal corporation, and alleges as follows:

1. This suit is brought pursuant to Rule 1.110, et seq., Florida Rules of Civil Procedure, and under authority of the Fifth and Fourteenth Amendments of the Constitu-

tion of the United States of America, Article I, Section 9, of the Constitution of the State of Flolrida, [sic] and Title 42, Section 1983 of the United States Code. The amount involved exceeds $5,000.00.

2. Plaintiff, YARDARM RESTAURANT, INC., is a Florida corporation and is the owner of real property located in Broward County Florida; Plaintiff, JAMES T. STEPHANIS, is a citizen and resident of Florida and is a founder and 50% owner of Plaintiff, YARDARM RESTAURANT, INC.; Plaintiff, THOMAS J. STEPHANIS, is a citizen and resident of Florida and is a founder and 50% owner of Plaintiff, YARDARM RESTAURANT, INC (hereinafter "YARDARM").

3. Defendant, CITY OF POMPANO BEACH (hereinafter "CITY"), is a Florida municipal corporation organized and existing under the laws of the State of Florida and located in Broward County, Florida.

4. YARDARM is entitled to relief from the Defendant CITY upon the following facts:

(A) In 1973, YARDARM made inquiry of the CITY about its zoning laws concerning height limitation of buildings and made known to the CITY, through its officials, its intent to make application to build an 18 story hotel on its real property located in Broward County, Florida, within the city limits of the Defendant CITY. At the time of YARDARM's first inquiry, they were advised that the height limits for buildings in the CITY were unlimited by the ordinances and laws of the CITY and there were no plans in progress to change them. Before YARDARM could perfect its application for a permit to build its 18 story building, the CITY advertised and passed an Ordinance limiting all buildings in the CITY to a height of 10 stories. [A copy of Ordinance No. 73-40 is attached hereto and marked EXHIBIT NO. 1.]

(B) YARDARM then made application to the CITY for a special exception use of its property pursuant to the

CITY's ordinances and regulations. After vigorous opposition by citizens groups and several of the Commissioners themselves, as well as officers and employees, the CITY granted the special exception use on the 10th day of October, 1983, allowing YARDARM to build its proposed 18 story hotel. [A copy of Ordinance No. 73-96 is attached hereto and marked EXHIBIT NO. 2.]

(C) On or about February 8, 1974, YARDARM presented its completed plans to the CITY for approval and sought a permit to build. On February 14, 1974, the plans were approved and the permit was issued by the Building Official of the City. On or about February 18, 1974 (or four days later), the Permit was revoked by the Building Official upon the direct order of the City Manager.

(D) Desperate attempts were made by YARDARM to satisfy the many post permit objections by the CITY to the plans submitted by YARDARM. The CITY would not be satisfied and failed to reissue the permit. For the following four months, CITY officers and representatives drew up list after list of objections to YARDARM's plans. When it became obvious that the CITY, through its officers and employees, had no intention to reissue the permit to build the hotel, YARDARM filed suit for declaratory decree in the Circuit Court of Broward County in June 1974.

(E) During preparation for trial during 1974-75, the CITY filed its motion for summary judgment. The trial court denied the motion and the CITY filed its notice of interlocutory appeal on August 4, 1975. On April 15, 1976, the Fourth District Court of Appeal affirmed the lower court's denial of the CITY's motion. But, by their unwarranted appeal, the CITY had delayed the trial for more than two years. [A copy of the Opinion of the Fourth District Court of Appeal dated April 15, 1976 is attached hereto and marked EXHIBIT NO. 3.]

(F) On September 26, 1976, after trial of the cause was had, final judgment was entered ordering the CITY to reissue the Permit. In its order declaring that the CITY reissue the permit, one of the findings of the court was that there was ". . . a showing of an obvious desire by the City to oppose the granting of a building permit to the Plaintiff." [A copy of the Final Judgment dated September 27, 1976 is attached hereto as EXHIBIT NO. 4.]

(G) Pursuant to the final judgment entered on September 26, 1976, YARDARM resubmitted its plans and continued its effort to have its permit reissued. The CITY denied all such requests, contending now that the Plans did not comply with the City parking ordinances. On February 14, 1977, Plaintiff filed yet another petition seeking the assistance of the Court on the issue of the parking ordinances. After a full trial, the court entered its order on March 24, 1977, ordering the CITY to grant the permit concerning parking in accordance with YARDARM's plans, holding the CITY's objections to be without merit. [A copy of the Order dated March 14, 1977 is attached hereto and marked EXHIBIT NO. 5.]

(H) YARDARM then applied for a permit to build its docks and boat slips in accordance with CITY ordinances but the CITY denied such permit. On January 30, 1978, YARDARM yet again was driven to the courts for relief and petitioned the court for supplemental relief for the issuance of a dock permit. On December 14, 1978, after another full trial, the court entered its order approving the stipulation by the Plaintiff and the City granting issuance of the dock permit on terms suggested by the court. Thus another year had been lost. [A copy of the Order dated December 14, 1978, is attached hereto and marked EXHIBIT NO. 6.]

(I) Demonstrating the CITY's continuing opposition, even after the Court entered its order upon the joint stipulation at trial concerning issuance of the dock

permit in 1978, when members of the public opposing the YARDARM project persuaded the Corps of Engineers to hold a public hearing concerning the legality of the permit for the dock, the City Manager himself, one John Schoeberlein, took a public position in opposition to the issuance by the Corps of Engineers of the dock permit, notwithstanding the stipulation by his employer, CITY, which was incorporated by the court in its order. [See letter by Schoeberlein dated May 15, 1979 attached hereto and marked EXHIBIT NO. 7.]

(J) On the 10th day of August, 1978, the CITY fired its Building Official, one Walter Williams, because he refused once again to revoke YARDARM's permit when he was ordered by the CITY to do so. The Building Official appealed his firing to the Board of Rules and Appeals, a body having jurisdiction to review such matters, and, after a full hearing, the Board of Rules and Appeals, by unanimous decision, ordered the CITY to reinstate the Building official. Thus was YARDARM's permit saved once again.

(K) On the 10th day of July, 1979, upon the order of the CITY through its City Manager, the Building Official once again did revoke the Permit. YARDARM appealed the revocation to the Board of Rules and Appeals which had jurisdiction of such matters. The said Board, after full and thorough hearing and by unanimous decision, upheld YARDARM's claim that the revocation was without cause and wrongfully and unlawfully done. [A copy of an excerpt from the September 13, 1979 meeting of the Broward County Board of Rules and Appeals is attached hereto and marked EXHIBIT NO. 8.]

(L) The CITY appealed the decision of the Board of Rules and Appeals restoring YARDARM's permit to the Circuit Court pursuant to the Rules governing such actions. The Circuit Court, after full hearing, affirmed the decision of the Board of Rules and Appeals on

December 21, 1979. [A copy of that Final Judgment is attached hereto and marked EXHIBIT NO. 9.]

(M) The CITY filed its notice of appeal from the order of the Circuit Court to the Fourth District Court of Appeal for a Writ of Certiorari on January 18, 1980. On July 1, 1981, the Fourth District Court of Appeals entered its judgment denying the Writ of Certiorari. Thus, the CITY had delayed the building by revoking and withholding YARDARM's permit for another two years and Plaintiff, YARDARM, alleges that it was done once again wrongfully, in bad faith, and without just cause, inasmuch as the Board or Rules and Appeals, the Circuit Court, and the Fourth District Court of Appeal had found the CITY's actions in revoking the permit two years earlier, i.e., July 10, 1979, to be wholly without merit. But, it had cost YARDARM another two years in building its hotel. [A copy of the July 1, 1981 Opinion of the Fourth District Court of Appeal is attached hereto and marked EXHIBIT NO. 10.]

(N) Thereafter the CITY reissued the permit. Due to the constant litigation over the previous seven years, YARDARM had been unable to finalize financing from numerous banks, lending institutions and private individuals and organizations because of the instability and uncertainty of its permit due to the litigation since 1974 and the constant, unrelenting and implacable opposition and harassment of the CITY to the building of the YARDARM hotel. Financial commitments in place in 1974 when the permit was first issued had vanished in whole or in part due to the continued opposition of the CITY. Not being able to finalize its full financing in order to protect its right to build a hotel upon its real property, YARDARM was forced to borrow money and mortgage its property on short term loans in order to keep some work in progress to comply with the CITY's rules pending permanent financing. YARDARM expended large sums of money for architects fees, legal fees, driving expensive

pilings, and other expenses to keep its permit alive. The CITY's harassing opposition and litigation permeated all of YARDARM's attempts to procure financing and raise the hotel from its foundation. CITY officials were always poised to revoke the permit upon any excuse. YARDARM spent large sums to keep some work in progress after 1981. The CITY finally revoked the permit once more in 1985 for failure to prosecute the work. [A copy of the CITY's letter dated July 10, 1985 to Plaintiff is attached hereto and marked EXHIBIT NO. 11.]

(O) YARDARM's inability to build or to meet its mortgage commitments on the short term loans it had been forced to enter into resulted in a suit of foreclosure on May 8, 1985 by Sunrise Savings & Loan Association, the lender who held the mortgage. Shortly thereafter, YARDARM was forced to seek the protection of the Federal Bankruptcy Court by the filing of a Chapter 11 proceeding on March 20, 1986.

(P) In October, 1985, the CITY, seeing the YARDARM prostrate and helpless, decided to repeal Ordinance No. 73-96, the special exception it had granted YARDARM in 1973 to build an 18 story hotel. The CITY published notice of the proposed repeal of the ordinance but did not give direct notice of the proposed repealing ordinance to YARDARM. YARDARM noticed the newspaper account of the proposed repeal of its special exception use (Ordinance No. 73-96) and once again sought the help of the Circuit Court to protect its special exception use. On November 20, 1985, the Circuit Court entered its order enjoining the CITY from repealing the special exception use granted by the CITY in 1973. [A copy of the Petition for Injunction and Order is attached hereto and marked COMPOSITE EXHIBIT NO. 12.]

(Q) On December 19, 1985, the CITY filed its notice of appeal of the Circuit Court Order enjoining the CITY from repealing the special exception use. The appeal to

the Fourth District Court of Appeal resulted in a decision for the CITY, the court holding that the injunction against an administrative act was improvidently granted.

(R) From the adoption of ordinance No. 73-40 in 1973 restricting all building in the CITY to 10 stories and the special exception granted in 1973 to YARDARM, the CITY has pursued its unusual, implacable, spiteful opposition to the building of Plaintiff's hotel as a policy of the CITY. Time and time again, from 1973 to the present time, the CITY has committed official acts by and through its officers and employees claiming violation of its ordinances and regulations and causing and pursuing litigation that cost YARDARM opportunity to procure construction financing and deprived it of all use of its property. On countless occasions since 1974 to the present, YARDARM has been forced to ask the protection of the courts to enforce its rights under the CITY's laws and ordinances in attempts to make lawful use of its property. On each occasion, YARDARM was successful in the court's [sic] against the CITY. On every occasion that YARDARM sought protection by the courts, the courts and appellate bodies held that the CITY's actions had been without merit. The instability and uncertainty caused by the litigation described herein permeated all of YARDARM's negotiations with lenders. The constant opposition of the CITY directly and proximately caused YARDARM not to be able to arrange permanent construction financing.

(S) The price of building the hotel has escalated from approximately Six Million Dollars in 1974 to over Twenty-Nine Million Dollars in 1987. The great financial burden in fighting the CITY during the past 12 years has brought YARDARM to the brink of losing its property in bankruptcy and foreclosure. Thus, the CITY has not only deprived YARDARM of all use of its real property for approximately 12 years, but now, at the last, will cause YARDARM to lose its property altogether as direct and

proximate result of the wrongful, unfair and bad faith conduct of the CITY through its wrongful official acts.

COUNT 1

(FOR JUST COMPENSATION FOR DEPRIVATION OF THE USE AND TAKING OF ITS PROPERTY PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, FLORIDA CONSTITUTION)

5. Plaintiffs reallege all of the allegations contained in paragraphs 1 through 4 (A) through (S) above.

6. Plaintiffs allege that the constant, relentless, implacable opposition of the CITY as alleged above has prevented Plaintiffs from building its hotel. By its acts of baseless claims of zoning or building code violations, Defendant has caused countless legal proceedings over the past 12 years, as alleged above. These acts have caused delays, impuned the legal status of Plaintiffs' building permit and they have frustrated Plaintiffs' efforts to get financing for its proposed hotel. The constant opposition and resulting litigation without just cause has successfully prevented Plaintiff from the lawful use of its property pursuant to their rights under the United States and Florida Constitutions, the laws of the United States and the laws of the Defendant CITY. The numerous acts of the CITY described above were committed in bad faith without good cause. Defendant, without Plaintiffs being granted their rights of due process, yielded to the demands of citizens groups who opposed the hotel. It tolerated and supported the unjustified opposition by various officials of the CITY. All of these acts, and others not enumerated, have resulted in depriving YARDARM of all use of its property and drove it into bankruptcy which has or will result in the total loss of its property.

7. Plaintiffs allege that they are entitled to full compensation for the loss of use of their property since

1974 to the present time and to full compensation for the total loss of the property itself under the Fifth Amendment of the Constitution of the United States, the Constitution of the State of Florida, the laws of the United States and, specifically, under the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States as articulated in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* decided June 9, 1987, by the Supreme Court of the United States.

WHEREFORE, YARDARM demands judgment:

(1) For just compensation for depriving YARDARM of all use of its property from 1974 to the present time in an amount in excess of Thirty-Five Million Dollars.

(2) For just compensation for the final total loss of its property under bankruptcy and foreclosure due to the acts of the CITY enumerated herein in an amount in excess of One Hundred Million Dollars.

(3) For reasonable attorneys fees.

(4) Such other and further relief as may seem proper.

(5) Plaintiffs demand a trial by jury of all issues triable by a jury.

COUNT II

FOR RELIEF UNDER TITLE 42 OF THE UNITED STATES CODE, SECTION 1983

8. Plaintiffs reallege all of the allegations contained in paragraphs 1 through 7 above.

9. YARDARM claims damages against the CITY under Title 42 of the United States Code, Section 1982. That Act provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

10. Plaintiffs allege that the CITY, acting under color of authority, has deprived the Plaintiff of the use of its property guaranteed by the Constitutions of this State and of the United States as alleged in paragraphs 4 (A) through (S) above.

11. YARDARM alleges that the acts of the CITY enumerated herein were malicious and in bad faith; that such acts were committed without probable cause to believe that the CITY's acts in opposition were legally valid and that YARDARM was not entitled to the matters and things claimed as alleged above, because in all but the appeal of the order enjoining repeal of the special exception use, the appellate boards, trial courts and appellate courts of the State of Florida have overruled the CITY and ruled in YARDARM's favor.

12. That as a direct and proximate result of the CITY's acts as alleged herein, the CITY has, under color of the laws, ordinances and regulations of the CITY, wrongfully deprived YARDARM of ". . . rights, privileges, or immunities secured by the Constitution and laws . . .", to-wit: all use of its property for 13 years and caused the total loss of its property in foreclosure and bankruptcy. Such rights and privileges to the enjoyment of its property is secured by the Constitution and Laws of the United States, all as provided by Title 42 United States Code.

WHEREFORE, YARDARM demands judgment:

(1) For damages for the deprivation and loss of all use of its property from 1974 to 1987 contrary to the law of the United States in an amount in excess of Thirty-Five Million Dollars.

(2) For damages for the total loss of its property by mortgage foreclosure and final taking of its property in an amount in excess of One Hundred Million Dollars.

(3) For reasonable attorneys fees.

(4) Such other and further relief as may seem proper.

(5) Plaintiffs demand a trial by jury of all issues triable by a jury.

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By /s/ Earl Faircloth
Earl Faircloth
Florida Bar #023501

BEST AVAILABLE COPY

EXAMPLES OF USES ALLOWED IN DISTRICTS B-3 AND B-5 (PRIOR TO 8-13-74)

EAST PROPERTY

B-3

PERMITTED USES

1. All residential uses; B-1 and B-2 uses except single family homes.
2. Agencies, including employment, new car agency, automobile rental and leasing.
3. Appliance, radio and television sales and repair.
4. Auction enterprise.
5. Bars.
6. Bicycle sales and repair.
7. Blueprinting, photostating.
8. Business and commercial colleges.
9. Dry cleaning, carpet, rug or bag cleaning and hand laundries employing five (5) persons or less.
10. Enameling, japanning, or lacquering hand brush applied or by dipping in tanks not over five (5) cubic feet capacity.
11. Express company.
12. Filling stations (for automotive vehicular service) subject to 750 foot distance between stations.
13. Grocery, market, bakery and similar enterprises, retail only.
14. Hospitals and clinics (not veterinary).
15. Hotels, motels and apartments.
16. Ice pick-up station, self-service and automatic laundry, personal service shops.
17. Job printing.
18. Moving picture houses, theatres, auditoriums, billiard or pool parlors.
19. Newspaper business and administrative offices.
20. Restaurants (Not drive-ins).
21. Small parts stores.
22. Stationery and office equipment.
23. Stone or monument display and retail sales only.
24. Studios.
25. Transportation passenger stations, terminals and depots.

B-5

PERMITTED USES

1. All B-3 uses.
2. Boats for hire or charter with approved docking facilities and including commercial fishing.
3. All similar uses and structures and uses.

EXHIBIT ____
YARDARM LAND

- B-1 - "Resort Retail"
- B-2 - "Neighborhood Retail"
- B-3 - "Central Retail"
- B-5 - "Commercial Business"

EXAMPLES OF USES ALLOWED IN DISTRICT B-2 (AFTER 8-13-74)

WEST PROPERTY

B-2

PERMITTED USES

1. Supermarket, hardware, variety, gift, florist, jewel wearing apparel, fabrics, drugs, books, bakery, and simi retail enterprises.
2. Filling stations for automotive type vehicles but not connection with auto repairs garages; water front or mar filling stations subject to 750 foot distance betw stations.
3. Self service and automatic laundry, dry cleaning and laun pick-up and delivery, ice pick-up and similar serv establishments.
4. Personal service shops such as barber, beauty parlor, s shine and shoe repair.
5. Post office substation.
6. BOAT LAUNCHING
   Boat launching and docking. Boat launching and dock permitted for hire, for sale, resale, warranty maintena service, and recreational purposes only; boats for hire charter with approved docking facilities and includ commercial fishing permitted; launching or docking for rep or overhaul not permitted. ('58 code, S 50.177) (Ord. 74- passed 11-27-73; Am. Ord. 74-69, passed 8-13-74)
7. All permitted zoning uses in district B-1 can be used in zoning district B-2.

☑ B-1 USES

a. Residential uses except single-family and duplex.
b. Agencies such as insurance, real estate, travel and employment.
c. Appliance, radio and television sales, and retail showrooms.
d. Banks and similar financial institutions.
e. Department store.
f. Restaurants.
g. Motels, hotels.
h. Music stores, photo shops, art galleries.
i. Office buildings.
j. Package stores for sale of alcoholic beverages.
k. Private and public utility offices.
l. Telephone, telegraph.
m. Bicycle sales.
n. Blueprinting.
o. Business and commercial colleges.
p. Hospitals and clinics.
q. Theaters and auditoriums.
r. Stationery and office equipment.
s. Funeral homes and mortuaries.
t. Open-air parking lots.
u. Child care center.
v. Multi-family residential in the same structure with a commercial use.

SOURCE OF INFORMATION DERIVED FROM: Chapter 155 "Zoning Code" City of Pompano Beach Florida Code of Ordinances and City of Pompano Beach Florida ordinance number 664 official zoning ordinance.

CITY OF POMPANO BEACH
BROWARD COUNTY, FLORIDA

I HEREBY CERTIFY that the foregoing is a true and correct copy of Excerpts from Ch. 155 of the Zoning Code as filed in my office. Building Dept

WITNESS my hand and Official Seal in the City OF POMPANO BEACH, FLORIDA this 19th day of February A.D. 19 91

Deputy City Clerk

Mary Kestcher